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EDITORIAL.

In this number we conclude the series of articles on Conditions of Sale and upon Restrictive Covenants. It was in order to do this that the space usually devoted to notes has been cut down, but the cases will be caught up in the next issue. It is now proposed to continue the series of articles on Registered Land which have been crowded out of this volume. The ever increasing importance of registered land seems to demand the continuance of these articles, but it is felt that perhaps overmuch attention was devoted to serial articles in the last volume. We do, however, propose in the near future to give some attention to the problem of concurrent interests in land which affords both practical and theoretical difficulties. It is hoped, moreover, to be able to give a larger place to articles of topical but permanent interest as well as dealing with very important innovations such as the Limitation Act, which will receive attention in the next issue.

We would like to take this opportunity of thanking those readers who have sent contributions and to remind others that we are glad to receive articles for consideration or letters on controversial points. We should also be glad to hear from readers with suggestions of topics for discussion arising out of their experience or of drafts or precedents on matters which they have met with but have not found in the present collection. Though the main purpose of this journal must be practical we should also be grateful for notes of any peculiar customs in connection with the Land Law or Conveyancing. These are matters which will interest though they may not be frequently met in practice.

OBITUARY.

Mr. Norman Henry Oldham.

By the passing of Norman Oldham on March 30 last *The Conveyancer* has lost one who did more than anyone else to make our periodical a really valuable and reliable help to so many of us in our work. It was in 1920 on the death of my father, the then editor, that I was appointed General Editor, and I at once approached Oldham and persuaded him to undertake the responsibility of writing and editing the notes and forms contained in the Encyclopædia of Forms. He accepted this responsible task and from that time until the old series of *The Conveyancer* was completed in June 1936, unaided month after month he completed twenty-four pages each month of forms and notes. He was a delightful person to work with and was never late with his copy, and his learning and accuracy were such that in seventeen years I think he made only three or four small slips of no great importance. When one considers the ground covered under his editorship, including practically every form from agreements to wills, it will be conceded that he did a wonderful work and did it well. At the time of his death Mr. Oldham was official solicitor of Queen Anne's Bounty.

He was born at Sale on December 19, 1879, the son of Joseph Oldham, a Manchester merchant. He was educated at Rydal School, Colwyn Bay, and Merton College, Oxford.

Ill-health prevented his taking a degree at Oxford, and he ultimately took a First-class Honours degree in Law at London University. He was called to the Bar by the Inner Temple in 1911, having obtained a Certificate of Honour at the Trinity term examination. After reading in Mr. Gregson's chambers in Lincoln's Inn, he practised on the Chancery side. He served throughout the War in France as a subaltern in the Royal Army Service Corps. In 1920 he joined the legal staff of Queen Anne's Bounty, becoming assistant solicitor in 1925, and solicitor in 1935. He was joint author of *The Law of Partnership* with J. A. Strahan, and was one of the editors of the fifth edition of *Bythewood & Jarman's Conveyancing Precedents*, in which he was responsible for the sections dealing with Leases and Wills.

In his work as solicitor to Queen Anne's Bounty he never spared himself. He was most painstaking and accurate in everything he did, and yet always could find time to help a subordinate. In him the Governors of Queen Anne's Bounty, and through them the Church, have lost a devoted servant and a profound lawyer.

A brilliant classic, he was accustomed to read and re-read the great Greek and Latin authors by way of mental relaxation. His other great interest in life was the study of music. He was a pianist of no mean ability, and used to devote two hours every evening to playing, his favourite composers being Chopin and Beethoven, and then (from 1920 to 1936) having finished his music he settled down to his work as Editor of the precedents to *The Conveyancer*. He was married twice. His two sons of the first marriage are both abroad—one being a Resident Magistrate in the Straits Settlement. In 1926 he married Miss Kathleen Taylor, and there is one son by that marriage.

DONALD C. L. CREE,
General Editor.

RESTRICTIVE COVENANTS AFFECTING FREEHOLD LAND.

By C. H. S. Preston and G. H. Newsom, of Lincoln's Inn.

(*Continued from p.* 327.)

VI. Proceedings.

A. *Actions upon Covenants* (*a*).

The normal remedy for breach of an express negative stipulation is an injunction restraining acts in breach of it.

1. *Doherty* v. *Allman.*

Doherty v. *Allman*, 3 App. Cas. 709, was a case of two leases each with about 900 years to run. The buildings had been corn-stores, and afterwards barracks; and the lessee proposed to convert them into dwelling-houses. There was no negative covenant to restrict such conversion, but there was a covenant in each lease to maintain and repair the premises. The lessor filed a bill to restrain the conversion, alleging waste and breach of covenant. Relief by injunction was refused by the House of Lords; the waste was ameliorating waste, and even if the covenant had been broken (which was doubted) it was not a negative one. Lord Cairns said, at p. 719: "If there had been a negative covenant, I apprehend, according to well-settled practice, a Court of Equity would have no discretion to exercise. If parties, for valuable consideration, with their eyes open, contract that a particular thing shall not be done, all that a Court of Equity has to do is to say, by way of injunction, that which the parties have already said by way of covenant, that the thing shall not be done; and in such case the injunction does nothing more than give the sanction of the Court to that which already is the contract between the parties. It is not then a question of the balance of convenience or inconvenience, or of the amount of damage or injury—it is the specific performance, by the Court, of that negative bargain which the parties have made, with their eyes open, between themselves." He then pointed out that for breaches of an affirmative covenant, such as was found in that

(*a*) An action by an owner of land for a declaration that his land is not subject to covenants raises the same questions as an action for an injunction, and does not require special treatment.

case, an injunction would only be granted if the Court was satisfied (which it was not) that circumstances required it to exercise its discretion.

Some affirmative covenants, however, carry with them a negative covenant by implication. As to such cases Lord Cairns said in *Doherty* v. *Allman*, 3 App. Cas. 709, at p. 720 : " I entirely admit that an affirmative covenant may be of such a character that a Court of Equity, although it cannot enforce affirmatively the performance of the covenant, may, in special cases, interpose to prevent that being done which would be a departure from, and a violation of the covenant." See *Lumley* v. *Wagner*, 1 D. M. & G. 606; *Wolverhampton and Walsall Ry.* v. *L. N. W. Ry.*, L. R. 16 Eq. 433; *Metropolitan Electric Supply Co.* v. *Ginder*, [1901] 2 Ch. 807; and *Ryan* v. *Mutual Tontine Westminster Chambers Association*, [1893] 1 Ch. 116. In dealing, however, with the enforcement of restrictive covenants affecting freeholds against persons other than the original covenantor, the question whether a negative can be implied from affirmative words will already have arisen before the question of the appropriate relief.

2. *Damage not necessary.*

Proof of actual damage is not an essential part of the claim for an injunction. " A person who stipulates that her neighbour shall not keep a school, stipulates that she shall be relieved from all anxiety arising from a school being kept, and the feeling of anxiety is damage " : *per* Lord Cranworth in *Kemp* v. *Sober*, 1 Sim. (N.S.) 517, at p. 520. Therefore, " a Court of Equity would not do its duty if it did not enforce the (negative) contract, because mere damages would not then afford a sufficient or adequate remedy " : *per* Lord Blackburn in *Doherty* v. *Allman*, at p. 729 : see also *Tipping* v. *Eckersley*, 2 K. & J. 264. Thus, where a legal nuisance is committed in breach of an express covenant not to commit a nuisance, the plaintiff is entitled to an injunction without reference to his right thereto apart from the covenant : see also *Att.-Gen.* v. *Mid-Kent Ry.*, L. R. 3 Ch. 100; *Jenkins* v. *Jackson*, 40 Ch. D. 71. But if the covenant is one to do a particular act only upon terms of paying money, then the money payment is part of the bargain the parties have made, and the Court will not restrain the act by injunction if the money is paid : *Aspden* v. *Seddon*, L. R. 10 Ch. 394; for mandatory injunctions, see *infra*, § 4.

3. *Notice material.*

Lord Cairns' reasoning, however, goes only to the case where the defendant is the original covenantor, or at any rate has taken

with actual notice. The defendant lessee in *Patman* v. *Harland*, 17 Ch. D. 355, could hardly be said to have had his "eyes open" to the restrictive covenant affecting the fee : it was common ground that he could not discover it. Therefore it may well be that in cases to which this reasoning does not fully apply, owing to the innocence of the defendant, the Court might be the more ready to refuse an injunction, especially if the defendant could also rely on one or more of the circumstances mentioned below as qualifying the plaintiff's right thereto. Again, even if an injunction is granted, it is sometimes suspended on the ground of hardship to the defendant : *Feilden* v. *Slater*, L. R. 7 Eq. 523; *Frost* v. *King Edward VII Welsh National Municipal Association, etc.*, [1918] 2 Ch. 180; *Thorn* v. *Madden*, [1925] Ch. 847; *Tubbs* v. *Esser*, 26 T. L. R. 145; *Achilli* v. *Tovell*, [1927] 2 Ch. 243. In *Kelly* v. *Barrett*, [1924] 2 Ch. 379, Tomlin, J., took the distinction between cases where there is, and those where there is not, privity of contract. He said "whether or not proof of damages is essential, I think that in this class of case, where there is no privity of contract, the Court has the right, and is bound, to exercise a judicial discretion with regard to granting an injunction" : at p. 397. The defendant succeeded on other grounds before the learned Judge. The Court of Appeal upheld his decision on those grounds, but were careful to express no opinion on this point (pp. 404, 411). It seems that this *dictum* departed too widely from Lord Cairns' principles. Indeed, in *Richards* v. *Revitt*, 7 Ch. D. 224, the point that there was no privity was taken in argument, and was rejected by Fry, J. The defendant had, however, actual notice. The rather different distinction between a defendant who is legally bound and one bound only in equity, however, is material at any rate on the question of the degree of acquiescence required to defeat the plaintiff's right to an injunction : see *Osborne* v. *Bradley*, [1903] 2 Ch. 446, at p. 451; *Chatsworth Estates Co.* v. *Fewell*, [1931] 1 Ch. 224.

4. *Mandatory injunctions.*

Where the defendant has broken a negative covenant and the plaintiff seeks a mandatory injunction to restore the *status quo ante*, similar considerations apply. In *Shelfer* v. *City of London Electric Co.*, [1895] 1 Ch. 287 (a case of nuisance by noise), Lindley, L.J., said : "Ever since Lord Cairns' Act was passed the Court of Chancery has repudiated the notion that the Legislature intended to turn that Court into a tribunal for legalising wrongful acts; or in other words, the Court has always protested against the notion that it ought to allow a wrong to continue simply because the wrongdoer is able and willing to pay for the injury he may inflict."

Those expressions in regard to nuisance apply more strongly to a breach of an express negative covenant. Thus in *Bickmore* v. *Dimmer*, [1903] 1 Ch. 169 (where the Court of Appeal, overruling Farwell, J., refused the plaintiff relief on another ground) Cozens-Hardy, L.J., said at p. 168 : " When a man who has entered into a covenant of this kind deliberately after notice of objection commits a breach of it, and there has been no laches on the part of the covenantee, it would be a most dangerous doctrine to hold that a mandatory injunction ought not to be granted." Nor is damage essential : *Manners* v. *Johnson*, 1 Ch. D. 673; *Stevens* v. *Willing & Co., Ltd.*, [1929] W. N. 53; *Heard* v. *Stuart*, 24 T. L. R. 104; its presence makes the case stronger : *Achilli* v. *Tovell*, [1927] 2 Ch. 243.

But although a plaintiff is thus *prima facie* entitled to an injunction, without proof of damage, mandatory injunctions have been refused for breach of negative covenants even where the breach was a continuing one. The rules laid down by Smith, L.J., generally in *Shelfer's Case*, *supra*, at pp. 322-3, were applied to the special case of restrictive covenants in *Sharp* v. *Harrison*, [1922] 1 Ch. 503. The plaintiff and his co-trustee were owners in fee of Nos. 8 and 9 Grand Avenue, two houses separated by a 7-foot passageway. This passageway was overlooked, at the date of the conveyance of No. 9 to the defendant, by seven windows in No. 8 and two windows on the second floor in No. 9. In 1917 No. 9 was conveyed to the defendant, who covenanted that no addition or external alteration was to be made without the vendor's consent, and that No. 9 was to be used as a private dwelling-house only. In 1921 the defendant proposed to commit, and after certain correspondence did commit, breaches, by converting No. 9 into three flats, and opening a window of frosted glass 6 feet by 4 feet on the first floor which overlooked the passage and a lavatory in No. 8. The defendant then let the flat containing the window for a term of five years. His co-trustee having died, the plaintiff began an action against the defendant, but not against the tenant, for a mandatory injunction requiring the defendant to close up the window; he was prepared to license the conversion into flats. Astbury, J., refused to grant the injunction and gave the plaintiff forty shillings damages and the costs of the action, relying on the following grounds:—

(1) There was no present damage to the plaintiff's premises; and the plaintiff's premises were in any case in lease.

(2) Any prospective damage was met by the undertakings offered by the defendant and incorporated in the order not to claim any easement in respect of the window, to

keep it always glazed with frosted glass, and, if she could obtain the tenant's consent, to keep the bottom sash screwed up.

For these reasons "the granting of a mandatory order would inflict damage upon the defendant out of all proportion to the relief which the plaintiff ought to obtain": at p. 515.

(3) The defendant's premises were in lease to a person not a party.

(4) There was some evidence that the plaintiff by his surveyor stood by and allowed the alterations to be made, and that the plaintiff had attempted to capitalise his right of action.

These last two matters, however, would not by themselves have disqualified the plaintiff, and it is submitted that the decision was based upon points (1) and (2).

Mandatory injunctions have been refused in other similar cases, particularly in the case of walls erected in breach of a covenant not to erect buildings. In *Bowes* v. *Law*, L. R. 9 Eq. 636, there was a covenant to erect no buildings except dwelling-houses to front with a terrace, and that no out-offices should be made within 30 feet of the road. The plaintiff obtained a mandatory injunction to pull down a wall 11 feet high facing the road, to the inner side of which a lean-to vinery was attached, but failed to obtain one against a continuation of it 8 feet 6 inches high, for which forty shillings damages were given. This case applied to mandatory injunctions the reasoning in *Child* v. *Douglas*, 1 Kay 560; 5 D. M. & G. 739. The defendant there in breach of a similar covenant built a wall 5 feet high. He proposed to raise it to a height of 15 feet and had actually raised it by 2 feet; moreover, he threatened to raise it to the height of his house if it were objected to. Page-Wood, V.-C., granted an interlocutory injunction (which was discharged by the Court of Appeal in Chancery on the grounds of acquiescence in the earlier breach), but His Honour remarked that it might have been different if the wall were only 5 feet high, and would have been different if the wall were only 2 feet high. In *L. C. C.* v. *Allen*, [1914] 3 K. B. 642, the defendant resisted a mandatory injunction, on the ground that the wall complained of was a mere fence, and Buckley, L.J., said, at p. 661, "the wall was only a nine-inch wall bonded into the walls on either side of the roadway to prevent it from falling, and was no more than a temporary fence. If this had been the case put forward at the trial . . . this defendant might have offered an undertaking to remove that which he says is a mere temporary fence, if and when requested to do so. . . . In the absence of such an under-

taking or offer, the order to pull down was, I think, rightly made." And in *Peek* v. *Matthews*, L. R. 3 Eq. 515, Page-Wood, V.-C., refused to give much weight to the suggestion that two walls, seven and five years old, were temporary. In *Kilbey* v. *Havilland*, [1871] W. N. 47 (which was doubted in *Sharp* v. *Harrison*, *supra*), £10 damages were given in lieu of a mandatory injunction, where the defendant had built in breach of a covenant not to build without submitting plans : cf. *Powell* v. *Hemsley*, [1909] 1 Ch. 680, at p. 689.

5. *Position of plaintiff.*

A plaintiff's right to an injunction may be qualified by his own position (*b*). He may be a reversioner, he may be disentitled by acquiescence, and in *Shelfer* v. *City of London Electric Co.*, [1895] 1 Ch. 285, at p. 317, Lindley, L.J., refers to " cases in which a plaintiff has shown that he only wants money: vexatious and oppressive cases, and cases where the plaintiff has so conducted himself as to render it unjust to give him more than pecuniary relief ". (But requiring money is not always fatal: *Cowper* v. *Laidler*, [1903] 2 Ch. 337.) Moreover, circumstances may have so changed since the covenant was entered into that it would be unduly onerous to enforce it by injunction.

6. *Reversioners.*

Where the plaintiff's interest is in reversion or remainder, he will not obtain an injunction unless the breach is such as to affect his interest. This was an element in *Sharp* v. *Harrison*, [1922] 1 Ch. 503, and was the ground of the decision in *Johnstone* v. *Hall*, 2 K. & J. 414. In the latter case, a lessor died having devised the fee to one for life and to the plaintiffs in remainder. During the life of the tenant for life the plaintiffs could not succeed against a sub-lessee, who broke one of the negative covenants in the lease. He opened a girl's school in breach of a covenant not to carry on any of several noxious or objectionable businesses " or any other trade business or employment whatsoever ". The possible detriment to the respectability of the neighbourhood was too minute, though, if the defendant had been carrying on some noxious trade which would seriously injure the character of the property, it might have been different. Moreover, as the interest of the plaintiffs was in remainder, acquiescence could not be urged against them when it fell into possession.

This plea is available only in cases where (a) the plaintiff has

(*b*) As to duration of injunction where power is given to form an opinion as to annoyance, etc., see V, § 26.

an interest in reversion or remainder in the protected freehold land, or (b) the plaintiff has an interest in remainder in a reversion upon a lease, as in *Johnstone* v. *Hall*, or (c) where the covenants are contained in a sub-lease and the plaintiff is the head lessor.

7. *Delay or acquiescence.*

The plaintiff may lose his right of action, or his right to an injunction, by delay or acquiescence in breaches of covenant or by a change in the character of the neighbourhood.

In principle, the cases dealt with under this head can be divided into those where the plaintiff loses his right of action, and those where he loses only his particular remedy; but as a practical matter the remedy by injunction is the substantial relief sought in such cases, as damages would usually be nominal : see *per* Fry, L.J., in *Sayers* v. *Collyer*, 28 Ch. D. 103. And even where the plaintiff seeks money, his method of obtaining it is to sue for an injunction and if successful make a bargain with the defendant that in consideration of money he will not enforce the injunction : see *Osborne* v. *Bradley*, [1903] 2 Ch. 446, at p. 457.

There are, moreover, three distinct groups; but again in practice the distinction is difficult to maintain, since the evidence tendered in such a case is usually directed to bringing the case within more than one of the three headings.

A. A plaintiff who with knowledge permits a particular breach to continue on the land, or has permitted earlier breaches of the same or similar stipulations there, may be disqualified thereafter from restraining breaches there.

Permission implies knowledge. In *Richards* v. *Revitt*, 7 Ch. D. 224, a conveyance in 1864 contained a covenant against sale of liquor. The defendant was a tenant of land with actual notice of the covenant, and held a licence to sell wines and spirits from 1869. Fry, J., held, however, that the plaintiff knew, from 1870 onwards, only that the defendant was selling *British* wines, and could therefore obtain an injunction against the sale of wine, spirits, ale and porter. But knowledge that the building of a hotel would involve the building of a stable was imputed to the plaintiff in *Eastwood* v. *Lever*, 5 D. M. & S. 114, at p. 126, although there was in that case further evidence of acquiescence.

The knowledge of the plaintiff must be that breach is intended. In *Willmott* v. *Barber*, 15 Ch. D. 96, Barber, the first defendant, held land of the second defendant, Bowyer, under a lease prohibiting assignment without licence. Barber gave the plaintiff a sub-lease and an option to purchase the head-lease, but when the plaintiff sought to exercise the option pointed out that he could not

assign since Bowyer refused his consent. In an action against Barber for specific performance and against Bowyer for an order that he should give consent, the plaintiff failed. He had spent money on the land and Bowyer knew it, but that expenditure did not point unequivocally to the breach intended.

Further, the plaintiff is not bound to take any steps to discover breaches, for example, by going to inspect the premises : *Tubbs* v. *Esser*, 26 T. L. R. 145.

In *Sayers* v. *Collyer*, 24 Ch. D. 180; 28 Ch. D. 103, a building estate was laid out in lots and sold subject to restrictions which constituted a building scheme. Both the plaintiff and the defendant were entitled to the benefit and subject to the burden of these restrictions, one of which was not to use the premises as a shop or to carry on any trade thereon. The defendant sold beer under an off-licence and had done so for three years, during which time the plaintiff bought beer at the shop. Pearson, J., refused to grant an injunction, and since the plaintiff could prove no damage dismissed the action. The Court of Appeal, however, held that the Court had power to award nominal damages in such a case, but that here the plaintiff's acquiescence was sufficient to bar his action, not merely to disentitle him to an injunction. The evidence showed considerable change in the character of the neighbourhood, but this case was distinguished from *Duke of Bedford* v. *Trustees of British Museum*, 2 My. & K. 552, because the change could not be attributed to the plaintiff : see *infra*, § 8; cf. *Kelsey* v. *Dodd*, 52 L. J. Ch. 34.

Some little delay in starting proceedings is not fatal : *Coles* v. *Sims*, 5 D. M. & G. 1; *Mitchell* v. *Steward*, L. R. 1 Eq. 541; and a delay of fourteen months in starting an action did not thus disentitle the plaintiff to relief by injunction, even though during the period the defendant purchased the land in the belief that the covenant would not be enforced : *Northumberland* v. *Bowman*, 56 L. T. 773. And delay may be explained by efforts to settle the matter or minimise the effects of breach : *Imperial Gas Light and Coke Co.* v. *Broadbent*, 7 H. L. C. 600; or by the plaintiff waiting to see to what extent a building being erected will infringe the covenant : *Webb* v. *Faggotti*, 83 L. T. 257; and a temporary licence cannot be relied on as waiver : *Wilkinson* v. *Rogers*, 12 W. R. 119.

In such cases as *Sayers* v. *Collyer* a continuing breach is acquiesced in, and cannot thereafter be restrained. Where the breach is not a continuing one, but visible traces of it remain upon the land, similar considerations apply. Thus, in *Gaskin* v. *Balls*, 13 Ch. D. 325, land was sold in 1864 under a building scheme,

which imposed (*inter alia*) a building line. In 1872 the purchaser of lots 1 and 2 built a bakehouse 12 feet high in front of the line, and about that time the plaintiff bought lots 6 and 7 which were opposite. The defendant purchased lots 1 and 2, and in 1877 began to erect a stable 15 feet high in front of the line. Bacon, V.-C., granted a mandatory injunction in respect of both buildings, but in the Court of Appeal the relief was limited to the stable, owing to the plaintiff's acquiescence : cf. *Wiltshire* v. *Cosslett*, 5 T. L. R. 410. A further ground was, however, put : the erection of the bakehouse was not a continuing breach of the covenant, and the scope of the covenant was limited to breaches committed during possession.

Again, if earlier permitted infringements are relied upon to justify later ones, both sets of infringement must be of substantially the same kind. They must not be merely trivial : see *London, Chatham & Dover Ry.* v. *Bull*, 47 L. T. 413; *Clacton-on-Sea Hotel Co.* v. *Aberdeen*, [1888] W. N. 54. In *Osborne* v. *Bradley*, [1903] 2 Ch. 446, the defendant relied on the permitted user of back premises as a warehouse, to justify converting the front premises into shops; but it was held that the permitted user was insufficient to support the latter.

8. *Change in character of neighbourhood.*

B. The plaintiff may likewise be disqualified if by reason of his acts or omissions the character of the neighbourhood is altered.

The leading case on this subject is *Duke of Bedford* v. *Trustees of British Museum*, 2 My. & K. 552. There, a conveyance of land in 1675 contained covenants by the purchaser to erect only buildings of a particular character, the purpose plainly being to restrict the land to user as a mansion house with the usual appurtenances. The plaintiff was entitled to the covenantee's adjoining lands (as a purchaser), and the defendants were purchasers of the burdened land. Lord Eldon and Sir T. Plumer, M.R., held that, whatever might be the plaintiff's rights at law (and at that date, 1822, it was uncertain to what extent the burden of covenants ran at law), he could not obtain relief by injunction against certain buildings in breach of the covenants. He and his predecessors had themselves built up or permitted to be built up the immediately neighbouring land, not in breach of any covenant, but in a way which made it inequitable to insist on the preservation of the defendant's land as provided for by the covenants, after the plaintiff had defeated the purpose for which they were entered into.

There the covenants did not constitute a building scheme, but were taken for the benefit of the covenantee's land; and the

alteration relied on took place by virtue of acts done upon that land. More commonly, such cases arise where there is a building scheme, and the alteration takes place by the omission of the plaintiff and others to enforce it : see *Peek* v. *Matthews*, L. R. 3 Eq. 515; *Sobey* v. *Sainsbury*, [1913] 2 Ch. 529.

But the departure, caused or permitted, must be such as to deprive the covenants of their purpose and so justify the breach complained of in the action. "It is in many ways analogous to the doctrine of estoppel": *per* Farwell, J., in *Chatsworth Estates Co.* v. *Fewell*, [1931] 1 Ch. 224, at p. 231. So in *German* v. *Chapman*, 7 Ch. D. 271, fifty-seven acres of land were sold subject to like covenants, but apparently without creating a building scheme. The fact that the plaintiff had permitted a purchaser to open a school for eighteen boys near the edge of the area did not disentitle him to an injunction restraining the opening of a school for 100 girls on four acres in the middle: see also *Hooper* v. *Bromet*, 89 L. T. 37.

If, however, the covenant is taken for the covenantee's own benefit and not for him as owner of a particular property, nor as part of a building scheme, a change in the character of the neighbourhood, even if brought about by himself, will not disentitle him to relief by injunction: *Osborne* v. *Bradley*, [1903] 2 Ch. 446.

C. The plaintiff may likewise be disqualified by an alteration in the character of the neighbourhood which cannot be attributed to his acts or omissions or those of his predecessors. In such cases relief is refused to the plaintiff, without his conduct disentitling him to it (as in the cases mentioned above), because the object with which the covenants were entered into has been defeated, though not by him.

In *Sayers* v. *Collyer*, 24 Ch. D. 180; 28 Ch. D. 103, the Court of Appeal was not prepared to take the step of extending the principle to cases in which it could not be put against the plaintiff that his conduct disentitled him to relief. And in *Pulleyne* v. *France*, 57 S. J. 173, the same view was apparently taken. But though the matter is not free from doubt it appears that the Court would now take a different view.

In *Knight* v. *Simmonds*, [1896] 1 Ch. 653; [1896] 2 Ch. 294, there was a building scheme. The earlier breaches of covenant relied upon by the defendant as a ground for refusing relief were held to be "trivial and privately carried on", and there had been no acquiescence on the part of the residents in breaches of the scheme. But Lindley, L.J., said, at p. 297: "Before granting equitable relief, Courts of equity look not only to the words of a covenant, but to the object to attain which it was entered into,

and if owing to circumstances which have occurred since it was entered into, that object cannot be obtained, equitable relief will be refused. . . . It is upon this ground that restrictive covenants intended to preserve the character of the land to be laid out and used in a particular way will not be enforced if the land has already been so laid out or used that its preservation as intended is no longer possible. Such a state of things can seldom if ever have arisen except from a departure by the vendor and the purchasers from him under the scheme, or from the laches and acquiescence of those entitled to enforce the observance of the covenants in question; but *whatever the explanation of the altered state of things may be* if the object to be attained by the covenant cannot be attained equitable relief to enforce it will be refused." This *dictum* and the italicised words therein were expressly approved in *Sobey* v. *Sainsbury*, [1913] 2 Ch. 515, at p. 530, though neither there nor in *Knight* v. *Simmonds* was it necessary for the Court to act upon them.

In *Chatsworth Estates Co.* v. *Fewell*, [1931] 1 Ch. 224, the defendant resisted an injunction for breach of covenant on the grounds that the plaintiffs and their predecessors had licensed many breaches, and that the character of the neighbourhood had been altered apart from their acts or omissions. He failed upon both grounds, and upon the second Farwell, J. (after doubting, at p. 228, whether Sargant, J., did not go too far in *Sobey* v. *Sainsbury*) said, at p. 230: "A man who has covenants for the protection of his property cannot be deprived of his rights themselves merely by the acts or omissions of other persons unless those acts or omissions bring about such a state of affairs as to render the covenants valueless, so that an action to enforce them would be unmeritorious, not *bona fide* at all, and merely brought for some ulterior purposes."

It is therefore clear that a much heavier onus rests on the defendant where he cannot attribute the change in the character of the neighbourhood to the acts or omissions of the plaintiff, and it is therefore highly material to make this attribution if it is possible to do so: see also *per* Simonds, J., in *White* v. *Bijou Mansions*, [1937] Ch. 610, at p. 626.

Law of Property Act, 1925, s. 84 (1) has adopted this principle and provided machinery for its application: see *infra*, §§ 14—29.

B. *Proceedings in regard to the title to the burdened land.*

9. *Proceedings in regard to title to the burdened land.*

When land upon which restrictive covenants have been imposed is sold, questions often arise concerning them between the vendor

and the purchaser, and may have to be determined in actions for specific performance, or for rescission or return of a deposit, or on vendor and purchaser summonses. The decision in such cases is, of course, one *inter partes*; nevertheless, though the effect of the decision is not binding upon the covenantee and his assigns, some of the like considerations apply as in actions for breach. It is, however, possible to bring proceedings to clear the title, and if this is done under Law of Property Act, 1925, s. 84, the decision will bind all persons; but if declarations are sued for against persons selected by the plaintiff, only the limited effect will be achieved: see *Re Union of London and Smith's Bank's Conveyance, Miles* v. *Easter*, [1933] Ch. 611.

The proper course for the vendor to adopt is full disclosure of any covenants affecting the land. For non-disclosure of an enforceable restrictive covenant is a ground for refusing specific performance to the vendor, or granting rescission to the purchaser. The latter is entitled to have what he contracted for and to have it unincumbered, that is, in this connection, free from any restrictions other than those imposed by the general law (*c*) or fully disclosed.

10. *Misdescription.*

If there is no description of the land other than that necessary to identify it, the purchaser is entitled to the land free from, and so can object to, *any* undisclosed restrictive covenants: *Rudd* v. *Lascelles*, [1900] 1 Ch. 815; *Pemsel* v. *Tucker*, [1907] 2 Ch. 191. The particulars of sale and any representations made by the vendor may, however, be material in two ways. They may show that the purchaser contracted for something less than an absolutely unrestricted freehold, in which case the question is whether the covenants forbid activities which the purchaser might justly think himself free to carry on. But they also assist the purchaser, for the vendor will be unable to rely on any condition of sale in general form to protect him from the results of misdescription: it may be otherwise if he says nothing.

In the following cases general representations were relied on.

In *Andrew* v. *Aitken*, 22 Ch. D. 218, a representation was made that a particular deed contained no covenants "unusually restrictive". The covenant complained of was that the grantee should erect one or more substantial house or houses of a stated annual value. Fry, J., admitted evidence that the usual form of the

(*c*) The restrictions imposed under Town Planning Acts do not constitute incumbrances for this purpose: *Re Forsey and Hollebone's Contract*, [1927] 2 Ch. 379.

covenant in the district was limited in time to two years and held this one "unusual": he doubted whether it was enforceable *in toto*; but he granted rescission on the ground that the purchaser was entitled to rely on the representation to protect himself from the possibility of litigation and the risk of some negative covenant being implied against him: cf. *Allen* v. *Smith*, [1924] 2 Ch. 308, where the covenants were represented to be "ordinary" ones.

Or the particulars or representations may be more detailed. Thus in *Flight* v. *Booth*, 1 Bing. N. C. 370, the particulars of sale of leasehold land in Covent Garden stated that "no offensive trade" could be carried on. The lease contained covenants against many more or less offensive trades, and also against the business of "fruiterer herb-seller . . . and the sale of . . . potatoes", which were certainly inoffensive in that quarter. The purchaser therefore succeeded in recovering his deposit. Similarly in *Re Davis and Cavey*, 40 Ch. D. 601, premises subject to a covenant against any trade or business were held not to fulfil their description as "leasehold business premises". Nor was land subject to covenants against building "freehold building land": *Dougherty* v. *Oates*, 45 S. J. 119; nor land whereon only one business could be carried on "valuable business premises": *Hunt* v. *Palmer*, [1931] 2 Ch. 287. Again, in *Wauton* v. *Coppard*, [1899] 1 Ch. 92, it was represented that the purchaser would be able to open a school. Rescission was granted, because there was a covenant against "injurious or offensive or disagreeable noise or nuisance" which (it was held) a school might well cause. *A fortiori*, it was granted where the plaintiff entered under an agreement for a lease, for the express purpose of opening a "high class boarding-house", and was compelled to give it up owing to a covenant affecting the fee: *Milch* v. *Coburn*, 55 S. J. 441.

Further, in *Reeves* v. *Greenwich Tanning Co., Ltd.*, 2 Hem. & M. 54, the contract provided that the vendor was to obtain a licence for the purchasers to carry on the business of tanning, which might otherwise be a breach of a covenant against "noisome noxious offensive or dangerous" trades. The best he could obtain was one which permitted the business so long only as it was not "in any manner noisy noxious offensive or dangerous"; and specific performance was accordingly refused.

11. *Rescission.*

The purchaser's remedy for such a misdescription is rescission, because compensation for it is not capable of assessment: *Cato* v. *Thompson*, 9 Q. B. D. 616, *per* Jessel, M.R., at p. 618; *Rudd* v. *Lascelles*, [1900] 1 Ch. 815. The rule applies to the sale of an

existing leasehold (*Reeve* v. *Berridge*, 20 Q. B. D. 523), or to a contract for a sub-lease (*Hyde* v. *Warden*, 3 Ex. D. 72), no less than to a contract for sale of a freehold; and it is immaterial that the sale is by auction: *Re White and Smith's Contract*, [1896] 1 Ch. 637.

Even before *Tulk* v. *Moxhay*, 2 Ph. 774, such a title would not be forced on a purchaser: *Bristow* v. *Wood* (1844), 1 Coll. 480.

The purchaser's right to have the land unincumbered means, in regard, for instance, to charges for money, a right to have the charge paid off. Since it is now possible to discharge restrictive covenants under Law of Property Act, 1925, s. 84, it may be that a purchaser would have no right to rescind for undisclosed covenants, if the vendor was ready and willing to take the necessary steps to clear them off the title, and succeeded in doing so.

Further, although the diminution in the value of land by reason of covenants affecting the whole of it is not assessable, the case may well be different if only a small part of the land is so affected. An error in description whereby no title can be shown to a small part of the land, because it is not the vendor's to sell, does not annul the sale, and is the subject of compensation (either under an express condition or under the general law). It seems that in such a case the existence of the covenants could be the subject of compensation upon the footing that the land affected by them was a very small part, and could be excluded from the sale with an abatement of the price: see *per* Parker, J., in *Halkett* v. *Dudley*, [1907] 1 Ch. 590, at p. 593. But in *Re Cox and Neve's Contract*, [1891] 2 Ch. 109, North, J., held that the part affected by the covenant was "a material portion", although it was small.

It is always a good defence for a vendor relying on the contract of sale to show positively that the restrictive covenants which appear to affect the land are not enforceable against it. Thus in *Millbourn* v. *Lyons*, [1914] 1 Ch. 35; 2 Ch. 231, the vendor was able to obtain specific performance by showing that there never had been anyone in a position to enforce the covenants under *Tulk* v. *Moxhay*, 2 Ph. 774, because there never had been any "protected land". In *Re Fawcett and Holmes' Contract*, 42 Ch. D. 150, the covenants were held to be personal to the covenantor. Again, it is sufficient if acquiescence for such a long period that no one could possibly succeed in an action for breach can be shown: *Hepworth* v. *Pickles*, [1900] 1 Ch. 108, where an action for rescission was dismissed, though without costs, the breach having been acquiesced in for twenty-four years: see also *Re Summerson*, reported *ibid.*, note, at p. 112 (thirty years' acquiescence), and *Gibson* v. *Doeg*, 2 H. & N. 615. But the

vendor must show more than uncertainty as to whether the covenants are enforceable: *Andrew* v. *Aitken*, 22 Ch. D. 218.

A title which depends on a doubtful question of fact, *viz.*, whether a previous purchaser took without notice, will not be forced on a purchaser: *Freer* v. *Hesse*, 4 De G. M. & G. 495; cf. *Re Handman and Wilcox's Contract*, [1902] 1 Ch. 599.

But, though uncertainty is, of course, not a ground for the making of a declaration under Law of Property Act, 1925, s. 84 (2), that a covenant is unenforceable, the onus of proof in such an application is different: see *infra*, § 35. In a doubtful case, therefore, it may well be prudent for a vendor to consider proceeding under that sub-section, rather than run the risks attendant upon a vendor and purchaser summons. In a plain case, however, a vendor and purchaser summons is preferable from the vendor's point of view, since an applicant under the sub-section must pay the costs: see § 37, *infra*.

12. *Provisions in the contract of sale.*

In *Rudd* v. *Lascelles* there was an open contract, and the case of an express provision for compensation was expressly reserved in the judgment. But it appears that the usual condition in general terms that misdescription shall not annul the sale, but that compensation shall (as in *Flight* v. *Booth*) or shall not (as in *Nottingham Patent Brick and Tile Co.* v. *Butler*, 15 Q. B. D. 261; 16 Q. B. D. 778) be allowed therefor, can make no difference. It is true that in *Ramsden* v. *Hirst*, 4 Jur. (N.S.) 200, compensation was ordered under such a provision for an undisclosed agreement that a third party should be entitled to work coal under the land. But it is difficult to see how an express direction to assess compensation can make that assessable which has been thus held not to be. Further, that condition is somewhat limited in scope: it does not protect a vendor from the results of his "wilful reticence or negligence": *Nottingham Patent Brick & Tile Co.* v. *Butler*, nor does it cover a large discrepancy between the description and the property: see *Jacobs* v. *Revell*, [1900] 2 Ch. 288; *Re Puckett and Smith's Contract*, [1902] 2 Ch. 258.

Nor do the other common conditions cover the point—the fixing of a root of title does not preclude the purchaser from raising objections to covenants, which he has discovered *aliunde*: *Re Nisbet & Potts' Contract*, [1905] 1 Ch. 391; [1906] 1 Ch. 386; *Nottingham Patent Brick and Tile Co.* v. *Butler*; nor, *a fortiori*, to covenants contained in a deed prior to the root of title but referred to therein: *Phillips* v. *Caldcleugh*, L. R. 4 Q. B. 159. If there is such a misdescription as is discussed above, an express

condition that the purchaser shall have notice of a document containing covenants does not assist the vendor: *Hunt* v. *Palmer*, [1931] 2 Ch. 287. Again, on a sale of a leasehold a condition that the title be thereby accepted by the purchaser did not permit a lease containing onerous and undisclosed covenants to be forced on the purchaser: *Re Haedicke and Lipski's Contract*, [1901] 2 Ch. 666.

13. *Form of the conveyance.*

Normally the form of the conveyance depends on the express words of the contract. Where it provided that "such purchaser will have to erect fences" the purchaser was bound to accept a conveyance with an express covenant by him to that effect: *Re Cooper and Crondace's Contract*, 90 L. T. 258. Conversely, where the contract provides for a conveyance subject to certain stated restrictions, the purchaser is not bound to accept a conveyance subject also to others, even if they do affect the land, and he is aware of them: *Re Wallis and Barnard's Contract*, [1899] 2 Ch. 515. In the absence of an express provision in the contract, the purchaser is not entitled to have a proviso limiting his personal liability to the period of his ownership annexed to his covenant to perform the scheduled stipulations: *Pollock* v. *Rabbits*, 21 Ch. D. 466.

But provisions may be inserted in a conveyance as a result of obligations only implied from the contract. Where a building scheme affects the land, of which the land being sold forms part, and the scheme is one binding the common vendor, the purchaser is entitled to require the common vendor's obligation to be expressed in his conveyance: *Re Birmingham and District Land Co. and Allday's Contract*, [1893] 1 Ch. 342. But Romilly, M.R., may have gone too far in *Baskcomb* v. *Beckwith*, L. R. 8 Eq. 100, in holding a purchaser not bound to complete his purchase of lot 1, unless the vendor covenanted also in respect of a plot excepted from the scheme, and not shown as belonging to the vendor on the sale-plan. Where land is sold subject to certain covenants contained in an earlier conveyance of it, the purchaser is bound to covenant by way of indemnity with his vendor to observe and perform the covenants, if the vendor will remain under any liability (*e.g.*, by having himself covenanted to indemnify his vendor): *Re Poole and Clarke's Contract*, [1904] 2 Ch. 173; see *Re Harris and Boots' Contract*, [1904] 2 Ch. 376; as to liability after parting with possession, see IV, § 10. He may insist on expressing that it is for indemnity only, but this is probably superfluous: see *Reckitt* v. *Cody*, [1920] 2 Ch. 452.

C. *Statutory Proceedings.*

(1) *Application to the Authority.*

14. *L. P. A., s.* 84 (*1*).

Law of Property Act, 1925, s. 84 (1), provides as follows:—

"The Authority hereinafter defined shall (without prejudice to any concurrent jurisdiction of the Court (*d*)) have power from time to time, on the application of any person interested in any freehold land affected by any restriction arising under covenant or otherwise as to the user thereof or the building thereon, by order wholly or partially to discharge or modify any such restriction (subject or not to the payment by the applicant of compensation to any person suffering loss in consequence of the order) on being satisfied—

"(a) that by reason of changes in the character of the property or the neighbourhood or other circumstances of the case which the Authority may deem material, the restriction ought to be deemed obsolete, or that the continued existence thereof would impede the reasonable user of the land for public or private purposes without securing practical benefits to other persons, or, as the case may be, would unless modified so impede such user; or

"(b) that the persons of full age and capacity for the time being or from time to time entitled to the benefit of the restriction, whether in respect of estates in fee simple or any lesser estates or interests in the property to which the benefit of the restriction is annexed, have agreed, either expressly or by implication, by their acts or omissions, to the same being discharged or modified; or

"(c) that the proposed discharge or modification will not injure the persons entitled to the benefit of the restriction:

"Provided that no compensation shall be payable in respect of the discharge or modification of a restriction by reason of any advantage thereby accruing to the owner of the land affected by the restriction, unless the person entitled to the benefit of the

(*d*) As to the concurrent jurisdiction of the Court, see *Re 108 Lancaster Gate*, [1933] Ch. 419, *per* Clauson, J., at p. 424. Under Housing Act, 1936, s. 163 (replacing Housing Act, 1925, s. 102, and Housing, Town Planning, etc., Act, 1919, s. 27), the county court is given jurisdiction to modify freehold or leasehold covenants so as to permit the conversion of dwelling-houses into two or more tenements, if it has become impracticable to let the single house owing to changes in the character of the neighbourhood: see *Alliance Economic Investment Co.* v. *Berton*, 92 L. J. K. B. 750, as to the exercise of the jurisdiction. The section is not restricted to tenements for the working-classes: *Johnston* v. *Maconochie*, [1921] 1 K. B. 239.

restriction also suffers loss in consequence of the discharge or modification, nor shall any compensation be payable in excess of such loss; but this provision shall not affect any right to compensation where the person claiming the compensation proves that by reason of the imposition of the restriction, the amount of the consideration paid for the acquisition of the land was reduced."

15. *The Authority.*

The Authority is defined by sub-section 10 as one or more of the Official Arbitrators appointed for the purposes of the Acquisition of Land (Assessment of Compensation) Act, 1919, to be selected by the Reference Committee under that Act.

16. *Rules and Procedure.*

By sub-section 4 the Reference Committee is given power to make Rules in relation to applications to the Authority, and, with the consent of the Treasury, to prescribe the fees payable. The existing Rules are the Law of Property (Restrictive Covenants Discharge and Modification) Rules, 1933 (hereinafter called the Rules) and the Law of Property (Restrictive Covenants Discharge and Modification) Fees Rules, 1933 (*e*). Earlier rules were made in 1925, but were revoked as from March 1, 1933. Sub-section 3 deals with the inquiries to be made and notices to be given in the course of proceedings before the arbitrator, and sub-section 6 with the evidence to be produced. The Rules deal with the method of bringing and prosecuting proceedings, including the selection of the arbitrator. A subpœna issues as of course, and without an order, for compelling the attendance of witnesses before the Authority: see *Annual Practice*, Central Office Practice Rules, 14 (11), and notes to R. S. C., Order 37, rule 20.

17. *Scope.*

Primarily the jurisdiction of the Authority relates to freehold land; but it is extended to leaseholds (other than land held on mining leases) where the term is for more than seventy years of which more than fifty have expired: sub-section 12. In *Cadogan* v. *Guinness*, [1936] Ch. 515, Clauson, J., decided that the periods of fifty and seventy years are to be calculated from the execution of the lease and not from any antecedent date from which the term is expressed to run. On the other hand, certain Crown and Government land is excluded from the section: sub-section 11; and so is land on which a restriction was imposed on the occasion

(*e*) Statutory Rules and Orders, 1933, No. 51/L.1 and 52/L.2 : see Appendix I.

of a gratuitous disposition (or one for a nominal consideration) for public purposes: sub-section 7.

Restrictions whenever imposed may be dealt with by the Authority: sub-section 7; and whether the land is registered land or not: sub-section 8. The restrictions need not necessarily have been created by covenant in the strict sense; sub-section 1 applies if they arise "under covenant or otherwise". But it is submitted that "otherwise" must be construed *ejusdem generis* with "covenant", and that therefore the Authority cannot deal with statutory restrictions, such as those arising under Town and Country Planning Act, 1932; but see the different language used in section 84 (2) (a).

18. *The applicant and persons served.*

The Authority may act on the application of "any person interested": sub-section 1. "Interested" is a wide word, and would include any person with a legal or equitable estate or interest in the land, though not, of course, persons merely interested in the popular sense. By Rule 3 (2) of the Rules two or more persons may apply jointly, whether the land in which they are interested is the same land or different parts of the land affected by the restriction.

After the application has been lodged, the arbitrator may direct notices to be served on persons claiming to be entitled to the benefit of the restriction, requiring them within a limited time to state any objections they may have to the application and what compensation, if any, they claim: Rule 6.

19. *Jurisdiction of the Authority.*

The Authority may "by order wholly or partially discharge or modify" the restrictions. Before doing so, it must be satisfied that the case comes within sub-clauses (a), (b) or (c) of sub-section 1.

20. *Jurisdiction: change of circumstances.*

Under sub-clause (a) the ground for an order is the change of circumstances. The sub-clause applies in two ways:—

(1) The Authority may decide that the restriction "ought to be deemed obsolete", "by reason of changes in the character of the property, or the neighbourhood, *or other circumstances of the case which the Authority may deem material*". Presumably the italicised words are to be construed *ejusdem generis*.

(2) The Authority may decide that the continued existence of the restrictions, or their continued existence unmodified, "would

impede the reasonable user of the land for public or private purposes without securing practical benefits to other persons ". This provision seems to differ from sub-clause (c) only in that the non-technical words " practical benefits " are used: the interests of a wider class therefore than is entitled to enforce the covenants are to be considered.

The jurisdiction under this head is wider than that of the Court, for the most that the Court can do is to refuse to enforce restrictions, if circumstances have so changed as to make it inequitable to do so. It cannot alter them: see *Re 108 Lancaster Gate*, [1933] Ch. 419, *per* Clauson, J., at p. 424, and cf. *Feilden* v. *Byrne*, [1926] Ch. 620.

21. *Jurisdiction: consent.*

Under sub-clause (b) the order can be made if the persons entitled to the benefit of the restriction from time to time " have agreed, either expressly or by implication, by their acts or omissions ", to the restrictions being discharged or modified.

It is submitted that the reference in this sub-clause to the annexation of the benefit of the restrictions to property is not to be read strictly, but that the sub-clause applies equally to persons entitled to the benefit by annexation or otherwise.

The utility of this sub-clause is obscure. There would be no reason to apply to the Authority if the agreement for discharge or modification was express; while if it is implied, this question is more suitable for the Court than the Authority. As Clauson, J., said in *Re Spencer Flats, Ltd.*, [1937] Ch. 86, at p. 90 " the arbitrator is not intended to deal with questions of law ", and the question whether certain conduct amounts to an implied agreement to discharge or modify is such a question.

22. *Jurisdiction: futility.*

The ground for an order under sub-clause (c) is that the proposed discharge or modification will not injure the persons entitled to the benefit of the restriction. If the applicant proceeds on this ground it will, of course, be unnecessary to consider the " practical benefits " referred to in sub-clause (a).

23. *Compensation.*

The Authority may direct " the payment by the applicant of compensation to any person suffering loss in consequence of the order ". But no person can obtain compensation unless he would have been in a position, apart from the order for discharge or

modification, to enforce the covenants: see *Re Spencer Flats*, [1937] Ch. 86. The measure of compensation is dealt with by the proviso, which provides for two classes of case.

1. Normally, the compensation is a sum ascertained by reference to the loss suffered by the claimant in consequence of the making of the order, irrespective of whether there is also advantage to the applicant.

It would seem that it will normally be improper for the Authority to award substantial compensation. If the case is one under the first branch of sub-clause (a), the restriction is obsolete, and it will therefore be difficult to show loss. If under the second branch, the continuance of the restriction would not afford practical benefits to anyone; if so, there is no case for compensation at all. If there has been a consent, under sub-clause (b), it is difficult to see how any act of the Authority can further damnify the consenting parties. If the case falls within sub-clause (c), compensation is necessarily excluded, since the order is made on the ground that it cannot injure the persons entitled to the benefit of the restriction, who alone are entitled to compensation. But in assessing compensation the mere fact of delay by the objectors does not prevent compensation being granted: *Re Spencer Flats*, [1937] Ch. 86.

2. By the concluding words of the proviso to this sub-section, compensation may be given if the person claiming it "proves that by reason of the imposition of the restriction, the amount of the consideration paid for the acquisition of the land was reduced." In such a case, therefore, compensation may be claimed for diminution of the purchase price, irrespective of loss. The amount of compensation, however, will hardly be susceptible of easy proof. The reference to the "imposition of the restriction" means that compensation is not to be paid *to* anyone but a vendor who imposes the restriction on a purchaser. It is immaterial, however, whether he is in a position to enforce as a matter of contract, or under *Tulk* v. *Moxhay*, 2 Ph. 774, and accordingly compensation may be ordered to be paid *by* such a purchaser or his assigns.

If compensation is awarded, the Rules provide that the order is not to come into force until the arbitrator endorses on it a certificate that it is paid: Rule 16 (1). He may direct that it be paid within a specified time, and if it is not so paid the order is void: Rule 16 (2).

By rule 16 (3) he may order that the compensation be paid into Court. In *Re Spencer Flats*, [1937] Ch. 86, Clauson, J., indicated that such an order would be proper in cases where the Authority is prepared to award compensation, if the person claiming it has a right to enforce the covenant, but where, as a matter of law,

that right is seriously called in question. If such an order is made, the person claiming the compensation has to apply to the Court under Law of Property Act, 1925, s. 84 (2), to establish his right to enforce. The money can be paid out on written directions signed by an official arbitrator and countersigned by the secretary to the Reference Committee : Supreme Court Funds Rules (No. 2), 1935.

24. *Point of law.*

Alternatively, where such a point of law is raised, the Authority has power to require an application to the Court under Law of Property Act, s. 84 (2), and to adjourn the case pending the Court's decision : Rule 9.

25. *The Order.*

If the Order is made it is to be in the form set out in the Schedule to the Rules, or in a form to the like effect : Rule 16 (4). If the land is registered land, the Act requires the Land Registrar to " give effect on the register to the order " ; section 84 (8).

Subject to the appeal to the Court, the order of the Authority when made is binding on all persons, whether ascertained or of full age or capacity or not, then entitled or thereafter becoming entitled to the benefit of any restriction dealt with by the order, whether such persons are parties to the proceedings or have been served with notice of them or not : section 84 (5).

26. *Appeals.*

The orders of the Authority discharging or modifying restrictions are subject to an appeal to the Court : section 84 (5). Rules of Court have been made under that sub-section : R. S. C., Order 54D. By rule 10 of that Order the appeal must be brought within twenty-one days of the order appealed from. By rule 4 (incorporating rule 2) it is by originating notice of motion in the Chancery Division (*f*), and is heard by a single Judge nominated by the Lord Chancellor. The present Judge is Morton, J., who was appointed by an order of Hailsham, L.C., dated January 11, 1938 : see [1938] W. N. 86. The proceedings should be intituled either " In the matter of an application for discharge of a restriction affecting [the property] and In the matter of section 84 of the Law of Property Act, 1925," as in [1933] Ch. 419. Or " In the matter of [the appellant] and in the matter of the Law of Property Act 1925 ", as in [1937] Ch. 86. There is no further appeal

(*f*) As to contents of Notice of Motion, see R. S. C., Order 54D, rule 9.

without leave of the Chancery Division or of the Court of Appeal : R. S. C., Order 54D, rule 8.

If the Authority dismisses the application, no appeal lies : *Re 108 Lancaster Gate*, [1933] Ch. 419. The appeal lies only if the Authority makes an order, not if it refuses to make one.

27. *Costs.*

By Administration of Justice Act, 1932, s. 6, a new sub-section (13) was added to Law of Property Act, 1925, s. 84, in the following terms :

"The costs of and incidental to every application to the Authority under this section shall be in the discretion of the Authority, who may direct by whom and to whom and in what manner the costs or any part thereof are to be paid, and may either tax the amount of the costs directed to be paid or direct in what manner they are to be taxed."

28. *Contracting Out.*

One rather important point arises, in respect of which there is at present no decision. A restriction may be imposed accompanied by a covenant that no application to vary it shall ever be made. It is submitted that such a provision is ineffective. On principle there does not seem to be any reason why parties should not release their statutory rights as much as any other rights. But such a provision must be read as part of the restriction with which it is coupled, making together a single complex restriction; if so, that complex restriction is a restriction on the user of the land, and is itself, therefore, capable of modification under section 84 (1) (*g*).

29. *Stay of legal proceedings pending application.*

By sub-section 9 the defendant in any proceedings to enforce a restrictive covenant may apply to the Court for an order staying the proceedings, pending an application to the Authority. Such an order was granted in *Feilden* v. *Byrne*, [1926] Ch. 620 (where the application was by motion). But in *Iveagh* v. *Harris*, [1929] 2 Ch. 142, it was held that an action for possession for breach of covenant is not a proceeding to enforce a covenant, so as to benefit by this provision. In that case the application was by summons.

In *Chatsworth Estates Co.* v. *Fewell*, [1931] 1 Ch. 224, the defendant suggested at the trial that the injunction (if granted) ought to be suspended to give him an opportunity to apply to the

(*g*) *Cum lex abrogatur, illud ipsum abrogatur quo non eam abrogari oporteat* : Cicero ad Atticum III, 23.

Authority. He had, however, been offered a respite by the plaintiff for this very purpose before the writ was issued, and had refused to take advantage of it. In those circumstances Farwell, J., refused to suspend the injunction, and presumably would have refused a stay of proceedings if an application had been made for that purpose under sub-section 9 at a somewhat earlier stage.

(2) *Applications to the Court.*

30. *L. P. A.*, *s.* 84 (2).

Law of Property Act, 1925, s. 84 (2), provides :

" The Court shall have power on the application of any person interested—

" (a) To declare whether or not in any particular case any freehold land is affected by a restriction imposed by any instrument; or

" (b) To declare what, upon the true construction of any instrument purporting to impose a restriction, is the nature and extent of the restriction thereby imposed and whether the same is enforceable and if so by whom."

Sub-section 2 confers a most valuable jurisdiction, which will in many cases render resort to the Authority unnecessary. Experience shows that a large number of restrictive covenants become unenforceable for one reason or another. Before this sub-section was passed, such covenants lingered on the title to the burdened land long after they had ceased to be enforceable, and thereby caused doubts and misgivings to prospective purchasers, whereby the price was inevitably affected. No adequate steps could be taken to clear the title. It was possible to launch an action for a declaration that the covenants were unenforceable, but such a proceeding was expensive, and the declaration, if obtained, was only binding on the defendants. Alternatively, the owner of the burdened land could infringe the covenants and await the issue of a writ for an injunction. No such difficulty now exists : an application under this sub-section is rapid and comparatively cheap, and the declaration is binding on all the world : sub-section 5.

Where restrictive covenants appear on a title, and it is desirable to clear them off, the owner's advisers should always consider seriously whether an application under this sub-section is likely to succeed before they entertain any question of applying to the Authority. An application to the Court is tried on affidavit in the relative privacy of the Chancery Division. It is usual for proceedings before the Authority to be advertised locally; they are tried with witnesses, and are liable to cause a stir. Moreover, they are

probably a good deal more expensive. Sub-section 2 has become much more popular in the last few years, though it is still insufficiently known.

31. *The Applicant.*

"Any person interested" may apply. These words are, of course, very wide, and include any person interested for any legal or equitable estate or interest in the burdened land or in the covenant. But since the applicant is generally the owner of the burdened land he is here treated as being so.

32. *The Application.*

Under Law of Property Act, 1925, s. 203, and R. S. C., Order 55, rule 14A, the application is by originating summons not *inter partes* taken out in Chambers in the Chancery Division. It appears that such an application relating to land within the jurisdiction of the Palatine Court or a County Court could in theory be made in one of those Courts. On a matter of this sort, where the experience of the Chancery Division is pre-eminent, the application should invariably be made there.

The originating summons is intituled in the matter of the property (as in [1932] 1 Ch. 79), or, more commonly, of the instrument creating the restriction, and in the matter of the Act. The body of the summons should state that relief is sought under section 84, and also under section 203 (5), if costs are asked for.

33. *The Respondent and persons notified.*

If there is anyone who obviously has an arguable claim to enforce the restriction, he or they should be made respondents. For example, in *Re Sunnyfield*, [1932] 1 Ch. 79, and *Re Ecclesiastical Commissioners' Conveyance*, [1936] Ch. 430, the Ecclesiastical Commissioners, as original covenantees, were obvious respondents. In *Re Ballard's Conveyance*, [1937] Ch. 473, the then owners of the Childwickbury Estate had clearly to be joined: cf. also *Re Rutherford's Conveyance*, [1938] Ch. 396. Sometimes it is very difficult to find a respondent. In such a case the person with the least unlikely claim should be joined.

But since the order, if made, is binding on all the world the Court takes precautions to prevent anyone's claim to enforce from being defeated without his knowledge. The rule on this subject was laid down in *Re Sunnyfield*, [1932] 1 Ch. 79, where Maugham, J., said: "When such an order as this is asked for, the Court ought to make every effort to see that all persons who may wish to oppose the making of the order have the opportunity of

being heard, stating their objections in argument before the Court, and inviting the Court to refuse to exercise its powers. In the present case, it seems that every effort has been made to give notice to all persons having a probable interest in the property, and accordingly I ought not to refuse to proceed to the hearing of the matter" : at p. 83. In *Re Ecclesiastical Commissioners' Conveyance*, [1936] Ch. 430, certain persons were added as respondents as a result of inquiries made to give effect to the observations of Maugham, J. : see p. 435.

Difficulties arise in applying this rule in cases where the covenants are enforceable, if at all, by the owners of a wide and vague area or some part of it, especially where the benefit of the covenants is not annexed to the protected land. The following procedure was successfully followed in an unreported case in which one of the authors was recently engaged. The applicants' advisers considered who were the persons who could on a reasonable view of the facts be supposed to have a right to enforce. On that reasonable view various persons who might have a "probable interest" were selected, and certain others, whose right was conceivable, though barely so, were excluded from consideration, in reliance on Maugham, J.'s, use of the expression "a *probable* interest" in the passage above quoted. A circular letter was sent to the selected persons informing them that the summons had been taken out, and stating the position fairly, but including the statement that the applicant had been advised by counsel that the covenants were plainly unenforceable. The addressees were informed that they might under the rule in *Re Sunnyfield* intervene in the proceedings, but that if they did so unsuccessfully the applicant would give no undertaking as to his attitude on the question of costs. With the circular was sent a form of consent to the order asked for, which each addressee was asked to sign. A similar circular and form of reply were sent to the respondent, who had only been joined because some respondent was necessary. As it turned out, all the addressees consented and the respondent did not enter appearance, with the result that no one save the applicant was represented at the hearing. The circular and the replies were exhibited to the affidavit of one of the applicants in support of the summons.

34. *Scope.*

Under sub-clause (a) the Court may declare whether or not "any freehold land is affected by a restriction imposed by any instrument". The reference to freehold land must be read as qualified by the later sub-sections. It includes certain land held

under long leases (sub-section 12), but excludes certain charity and public lands: sub-sections 7 and 11. All those sub-sections apply here just as much as to applications to the Authority: see § 17, *supra*. The restrictions must be ones imposed by an "instrument"; by Law of Property Act, s. 205 (1) (viii), "'Instrument' does not include a statute, unless the statute creates a settlement."

The declarations which may be granted under sub-clause (b), however, are far wider, since they may deal with "the true construction of any instrument purporting to impose a restriction". The sub-clause is not confined to freehold land, nor expressly to land at all, but land within sub-sections 7 and 11 is excluded, since those sub-sections say that "*the section*" is not to apply to the land there referred to.

A declaration under this sub-clause is not confined to questions of enforceability, but may also deal with the "nature and extent" of the restriction. It is therefore possible to obtain a declaration whether, upon the true construction of the restriction, any given activity may be a breach of it.

35. *Burden of proof.*

An applicant under this sub-section would, at first sight, be in a difficulty if he wishes to get a declaration that the covenant is unenforceable, since that is usually a question involving an investigation of the title to the protected land, which he may well not be entitled to see. This difficulty is met in two ways: by sub-section 6 an order may be made without the necessity of producing the instrument imposing the restriction, and the Court may act on such evidence of it as it thinks sufficient. Further, it is understood that Clauson, J., stated in the course of the argument in *Re Ballard*, [1937] Ch. 473 (though the point is not reported) that once the applicant has made out a *prima facie* case, the onus is upon the respondent, who is treated as if he were plaintiff in an action to enforce the covenants.

36. *The Order.*

The order, once made, is binding on all persons whether parties or *in esse* or not: sub-section 5.

37. *Costs.*

The reports of cases (*h*) under section 84 (2) do not deal with

(*h*) *Re Sunnyfield*, [1932] 1 Ch. 79; *Re Ecclesiastical Commissioners' Conveyance*, [1936] Ch. 430; *Re Ballard's Conveyance*, [1937] Ch. 473; *Re Rutherford's Conveyance*, [1938] Ch. 396; *Re Heywood's Conveyance*, [1938]

the costs. But the matter was in fact thoroughly discussed in *Re Ballard*. Two views might plausibly be put forward in regard to a contested summons: either it is hostile litigation and costs should follow the event, or it is a proceeding brought by the applicant to clear his own title, and not provoked by the respondent, in which case the costs should be paid by the applicant. Both these views were urged in *Re Ballard*, but neither prevailed. In that case the applicant had already paid the respondent's costs of looking into the legal position before the summons was issued. When the case came on it was seriously argued for several days. Clauson, J., ordered the successful applicant to pay the respondent's costs down to the date of the appointment before the Master next after all the evidence had been filed. Those costs were given on the ground that the respondent was entitled to insist on the whole position being thoroughly elucidated, so that he might see how he stood. The later costs, including, of course, those of the hearing, were refused, on the ground that, once the evidence was complete it was possible for the respondent to see that the covenants were unenforceable, and that after that date his continued opposition must be at his own risk as to his own costs.

This decision on costs seems to provide a sound working rule. It protects a respondent, but discourages him from hopeless litigation at the expense of the applicant. The conclusions therefore are (1) a respondent will never be ordered to pay the costs of the applicant, since that was not done in *Re Ballard*, where the respondent was completely unsuccessful; (2) the respondents' costs down to the stage referred to by Clauson, J., must be paid by the applicant if the applicant is successful, and clearly an unsuccessful applicant must pay all the respondent's costs.

No reported case has yet been to the Court of Appeal, but it is submitted that the costs in the Court of Appeal would follow the event, as they do in ordinary construction summonses.

38. *Registered land.*

If the land dealt with in the declaration is registered land, the Land Registrar must give effect on the Register to the order when made : sub-section 8. An order that the Charges Register should be amended was asked for in *Re Sunnyfield*, [1932] 1 Ch. 79. The report does not state whether it was granted, but it presumably follows as of course.

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2 All E. R. 230; *Re Union of London and Smith's Bank's Conveyance, Miles* v. *Easter*, [1933] Ch. 611, does not seem to have been under s. 84 (2), and *Cadogan* v. *Guinness*, [1936] Ch. 515, was a summons under R. S. C., Order 54A, rule 1A, to construe s. 84 (12).

39. *Application directed by the Authority.*

If it appears to the Authority that a question of law fit for the decision of the Court under section 84 (2) arises in a case proceeding before him, he may require, either at or before the hearing, that an application to the Court be made and may adjourn the case pending the Court's decision : Law of Property (Restrictive Covenants Discharge and Modification) Rules, 1933, rule 9; see § 29, *supra*.

CONDITIONS OF SALE OF LAND.

By E. O. Walford, LL.D., Solicitor.

(*Concluded from p.* 284.)

Law Society's Condition.

Misdescription and Compensation.

31.—(1) Measurements and quantities, if substantially correct, shall not be the subject of compensation nor shall any compensation be payable in respect of any mistake in a sale plan, furnished for the purposes of identity, but nothing in this paragraph shall prevent compensation being paid or allowed under the next paragraph where an incorrect statement, error or omission, as to measurements, quantities or otherwise, materially affects the description of the property.

(2) Subject as aforesaid, any error, omission, or misstatement in the contract, which may be discovered before completion, though materially affecting the description of the property, shall not annul the sale, or entitle a purchaser to be discharged from his purchase, but (if pointed out before completion and not otherwise) compensation shall be made to or by a purchaser, as the case may require.

(3) The amount of such compensation, if the parties do not agree, shall be settled by arbitration by a sole arbitrator agreed by the parties, or in default of such agreement, nominated by the President or other principal officer for the time being of the local law society, or, where there is no local law society in the district wherein the land is situated, by the President for the time being of The Law Society, and the Arbitration Act, 1889, or any statutory modification or re-enactment thereof for the time being in force, shall apply accordingly.

(4) Nothing in these conditions shall—

(a) entitle the vendor to compel the purchaser to accept or the purchaser to compel the vendor to convey (with or without compensation) property which differs substantially, whether in quantity, quality,

tenure or otherwise, from the property agreed to be sold and purchased;

(b) affect the right of the purchaser to rescind or repudiate the contract where compensation for a claim attributable to a material error, omission or mis-statement, cannot be assessed.

It is thought that the effect of the above condition is best explained by dealing with the paragraphs in a different order.

(1) *Condition* 31 (4).

The overriding principle is that the purchaser cannot be compelled to accept, nor can the vendor be compelled to convey, property which differs substantially in quantity, quality, tenure or otherwise from the property agreed to be sold and purchased.

This is somewhat puzzling. Generally the purchaser is at liberty to take what the vendor can offer, and can also claim compensation in respect of the deficiency (unless there is an express condition negativing compensation). On the other hand, if the discrepancy between the property described in the contract is such that the purchaser will not be getting substantially what he contracted to buy he may, at his option, refuse to proceed with the purchase: see *Flight* v. *Booth* (1834), 1 Bing. N. C. 370, and other cases cited above. The Law Society's Condition not only negatives the purchaser's right to take with compensation whatever interest the vendor has, but also provides that if the vendor has been careless or unfortunate enough seriously to mislead the purchaser as to the nature of his interest, then the purchaser shall not be entitled, even if he waives any claim to compensation, to make the best of the position and to take such interest as the vendor can convey to him. Thus if the vendor sells a property as "leasehold" but it is in fact an under-leasehold interest, it is right that this serious misdescription should prevent the vendor from compelling the purchaser to accept the property. It may, however, be of great importance to the purchaser that he should occupy this particular property. For this reason he may be willing, even without receiving compensation, to abide by the contract. But if the Law Society's Condition means what it appears to state, the vendor can say: "I find that I have by mistake substantially misdescribed the property, with the result that I do not propose to proceed with the sale. I admit that I am not entitled to rescind the contract. However, for certain reasons I do not wish to proceed with the sale, and this very helpful condition enables me to refuse

to proceed with it. Here is your deposit, and that appears to end the matter."

(2) *Condition* 31 (2).

Although the error, omission or misstatement may not be so serious as to render the contract unenforceable (by either party) under sub-section (4), it may nevertheless "materially affect the description of the property". In that case sub-section (2) of the condition will apply. Accordingly the purchaser will be entitled to compensation. A recent case (in which the Law Society's General Conditions of 1925 applied) serves as an illustration of the circumstances in which compensation will be allowed. The particulars and conditions of sale were silent as to two sewers which, as the vendors knew, ran under the property. It was found that the existence of these sewers did not so affect the property as a dwelling-house (although "materially affecting the description") as to make it substantially different from that which the purchaser had agreed to buy, and specific performance with compensation to the purchaser was decreed: *Re Belcham and Gawley's Contract*, [1930] 1 Ch. 56.

If, however, compensation cannot be assessed the condition does not affect the right of the purchaser to rescind the contract: sub-section (4) (b).

Although this condition does not state that the vendor also can rescind if compensation cannot be assessed, it nevertheless appears that he will normally be in a position to do so under clause 10 of the Law Society's Conditions, unless the purchaser forestalls him by rescinding under Condition 31. If the purchaser does not do so, then upon the purchaser delivering his requisitions, the vendor can give the purchaser notice under Condition 10 that he requires him to withdraw his requisition. If the purchaser does not do so within ten days the vendor can then rescind the contract. Then under Condition 10 (2) the purchaser will receive back his deposit, but will not recover any costs or compensation. In other words, although under Condition 31 it would appear that the purchaser may expect to receive compensation as of right, it is clear from the authorities that the vendor can generally escape the liability to pay compensation if he is prepared to rescind the contract: see *Merrett* v. *Schuster*, [1920] 2 Ch. 24; *Procter* v. *Pugh*, [1921] 2 Ch. 256; *Hoy* v. *Smithies* (1856), 22 Beav. 510 (where, however, it was expressly provided that the compensation condition should not limit the vendor's right to rescind); *Mawson* v. *Fletcher* (1870), 6 Ch. App. 91. But see *The Conveyancer*, Vol. I, pp. 254—260, as to the circumstances in

which the vendor may be unable to exercise a right of rescission given to him by the contract to rescind the contract. See also the rules above stated in connection with conditions permitting compensation for errors.

It will be noted that under paragraph (2) of this condition compensation is only to be made to or by a purchaser if the error, omission or misstatement is pointed out before completion. But for this provision compensation could be claimed notwithstanding completion of the sale: *Palmer* v. *Johnson*, 12 Q. B. D. 32.

(3) *Condition* 31 (1).

The remaining class of case (dealt with by paragraph (1) of Condition 31) is that in which either—

(a) There is some slight mistake in measurements or quantities but they are substantially correct, or

(b) There is a mistake (great or small) in a sale plan furnished for the purpose of identity.

In such cases no compensation will, in general, be payable. There is, however, a safeguarding provision the effect of which is that compensation will nevertheless be payable, however slight the mistake in the plan or the measurements or quantities, if the result is materially to affect the description of the property. For example, it is thought that if the property is described as "having a width of 20 feet and bounded on each side by a fence belonging to the property sold", but the actual width is 19 feet 8 inches and the fence on one side is actually outside the vendor's land, the vendor cannot enforce specific performance without compensation, as the deficiency is one "materially affecting the description". Indeed, although in such a case specific performance with compensation will be ordered if a reduction in the price will form a suitable and fair compensation in the circumstances, it may be that a very slight mistake in measurements may render the property quite unsuitable to the purchaser. Thus if, according to the measurements of the property given in the contract, the purchaser will have just sufficient room to erect a certain building, and he has purchased the land for that purpose, a very slight deficiency may make the property quite useless to him. In such a case compensation would not meet the situation, and the purchaser would be entitled to refuse to complete, and, indeed, to rescind the contract in spite of the trivial shortage of land: *Re Deptford Creek Bridge Co. and Beavan* (1884), 28 S. J. 327; cf. *Brewer* v. *Brown* (1884), 28 Ch. D. 309. The purchaser is not bound to show that he informed the vendor of the purpose for which he required the property in order to resist completion on account of a vital though

slight misdescription: *Knatchbull* v. *Grueber* (1815), 1 Mad., p. 168; cf. *Brook* v. *Rounthwaite* (1846), 5 Hare 298. It was laid down in *Magennis* v. *Fallon* (1829), 2 Mol. 561, that in the case of a contract "for a particular object having in the eye of a purchaser a particular value from circumstances not capable of pecuniary compensation", the purchaser cannot be compelled to perform the contract if (owing to some error or deficiency) those circumstances are absent.

(4) *Condition* 31 (3).

Paragraph (3) of this condition affords a simple means of assessing compensation, failing agreement, by providing for arbitration by a sole arbitrator agreed by the parties or nominated by the President of the local law society.

By section 27 of the Arbitration Act, 1889, a "submission" to arbitration is defined as being a written agreement to submit present or future differences to arbitration. No doubt paragraph (3) of this Condition amounts to a submission, and is irrevocable except by leave of the Court: see section 1 of the Act.

Presumably the President or other principal officer of the law society concerned will not nominate an arbitrator unless both parties so request. It might be thought that the appointment should be made at the request of either party, but the wisdom of such a provision appears to be doubtful. If at the request of one of the parties an arbitrator is appointed it would appear that there is no reason why he should not proceed with the arbitration, and, indeed, it would seem that neither party could properly cancel the authority of the arbitrator to proceed to his award, except as the result of an order in legal proceedings. Such a position would appear to be extremely unsatisfactory unless it was already agreed between the parties that compensation was to be paid. Otherwise, after the expense of the arbitration had been incurred, and the compensation assessed, the Court might hold in the course of legal proceedings taken by the other party either (i) that no compensation was payable, or (ii) that compensation could not fairly be assessed or that for some other reason the contract could not be enforced.

It appears to be quite possible that in certain circumstances the purchaser may be given an undue advantage by this condition. Thus, if the case is one in which it is doubtful whether specific performance will be awarded—even with compensation—but the Court ultimately decrees specific performance with compensation, it would seem that the Court could not assess the compensation unless the purchaser agreed. The vendor would then be forced

to meet the further expense of arbitration proceedings for the purpose of fixing the amount of the compensation in addition to the Court proceedings unless the Court in the exercise of its discretion signified its disapproval of the purchaser's conduct by refusing to award to him the costs of the proceedings. This, however, seems to be impossible (see *Wyndham* v. *Jackson*, *supra*), since the Court could hardly damnify the purchaser on account of his insistence upon the strict adherence to the terms of the contract. Even after this stage trouble may still arise. As the Arbitration Acts, 1889—1934, apply it will be competent to the Court to set aside the award in certain cases of "misconduct", *e.g.*, mistaken refusal by the arbitrator to accept relevant evidence, or other technical grounds. See in this connection the case of *Re Carus-Wilson and Greene* (1886), 18 Q. B. D. 7, as to the finality of the decision of a person who is a mere valuer and not an arbitrator: *The Conveyancer*, Vol. I, at p. 13. In the case of an arbitration award, if it appears from the award itself that the arbitrator has, for example, decided the matter upon evidence which is not in law admissible or on principles of construction which the law does not countenance, then there may be ground for setting aside the award: *Kelantan Government* v. *Duff Development Co.*, [1923] A. C. 395. But the award is not vitiated by an error in law if the arbitrator's finding on a question of fact renders the point of law immaterial: *Buerger & Co.* v. *Barnett* (1919), 120 L. T. 570.

It seems questionable whether, on balance, any substantial advantage is gained by the application of the Arbitration Acts in relation to the method of assessing compensation. An alternative form of condition was used in *Bos* v. *Helsham* (1866), L. R. 2 Ex. 72, namely, that the compensation was to be settled by two referees, "one to be appointed by either party or an umpire to be named by the referees before they enter upon the reference, whose decision shall be final". This condition was held not to be a submission to arbitration, so that the Court could not set aside the decision of the referees or their umpire. It is not suggested that there is nothing in favour of arbitration as distinct from an informal assessment of compensation. Many persons may prefer "a judicial inquiry worked out in a judicial manner" (this being the description applied to arbitration by Lord Esher, M.R., in *Re Carus-Wilson and Greene*, *supra*). It is, however, to be pointed out that:—

(i) The advantage of finality rests with the method of assessment by informal valuation.

(ii) The parties may prefer to rely upon the special knowledge

and experience of a known and trusted surveyor or other agent, rather than to place their interests in the hands of a person to be selected by a third party of whom they know nothing, and who, although impartial, may be quite an unsuitable person to deal with such a case.

In cases in which it is desired to substitute an informal valuation for arbitration under Condition 31, this can be done quite simply by adding to the special conditions as follows:—

(a) A declaration that Condition 31 (3) shall be deemed to be deleted.

(b) A statement that [if the parties shall agree in writing that compensation is or may be payable in accordance with this condition then] (for the purposes only of this present provision) Condition 3 (1) of these conditions shall be deemed to extend to the assessment of such compensation, with the following variations:—

(i) For the first three lines of paragraph (1) of Condition 3 the following provision shall be substituted: "Where compensation is or may be payable under Condition 31 assessment of such compensation shall be made in manner following—"

(ii) The term "assessment of compensation" shall be substituted for the term "valuation".

(iii) If the valuers or their umpire shall decide that no compensation is payable such decision shall be as binding on the parties as a decision that a specified amount of compensation is payable.

It is possible that even if the parties agree that compensation shall be paid, the arbitrator may come to the conclusion that compensation cannot fairly be assessed, and in that case it would presumably be his duty either to embody his decision to that effect in his award, or to state a special case to the Court under section 19 of the Arbitration Act, 1889. Then, if the Court should hold that compensation cannot be fairly assessed the expenses already incurred in connection with the arbitration will be lost in addition to the costs of the legal proceedings. If the Court held that compensation could be fairly assessed the matter would then have to go back to the arbitrator to assess the amount of the compensation.

It is not intended to suggest that in every case the party seeking compensation will be able to insist that the matter should proceed to arbitration whilst other matters of material importance to the question whether compensation is payable or whether the contract is enforceable are in dispute. On the contrary, the Court has a

discretion in the matter. Under section 4 of the Arbitration Act, 1889, the Court may, if there is no sufficient reason why the arbitration should not proceed, stay legal proceedings brought by either party to the submission, provided that the other party applies for such stay before taking any steps in the proceedings. Where, however, a question of construction or of law is involved which ought properly to be determined by the Court, the Court will not normally stay the Court proceedings: *Lyon* v. *Johnson*, 40 Ch. D. 579; *Re Carlisle*, 44 Ch. D. 200. It may, perhaps, be stated that the action will not be stayed if the matters to be dealt with in the action are not substantially identical with the matters required to be submitted to arbitration, although connected therewith, *e.g.*, where some relief is sought which could not be granted in the arbitration: *Cook* v. *Catchpole*, 34 L. J. Ch. 60; *Wheatley* v. *Westminster, etc., Co.*, 2 Dr. & Sm. 347; *Ives* v. *Willans*, [1894] 2 Ch. 478. Generally where the matter is more suitable for determination by the Court than by an arbitrator, the Court will refuse to stay the proceedings (*Barnes* v. *Youngs*, [1898] 1 Ch. 414), and if a question of law is involved the Court will decide it before remitting the matter to arbitration: *Re Carlisle*, 44 Ch. D. 200. Accordingly the provision for assessment by arbitration of the amount of the compensation will not prevent either party from obtaining the ruling of the Court in respect of any preliminary matters which require to be determined before the expense of arbitration is incurred.

To avoid any doubt upon the point, the writer would make it clear that he does not specially favour the method of informal valuation in accordance with the special condition above mentioned, but thinks that, on balance, it is better, in *general* conditions of sale, to leave the assessment of compensation to the Court and to omit any condition designed to afford an easy means of assessing compensation. The writer admits that he is prejudiced against arbitration, being of the opinion that it is often expensive, and that it is inconclusive, because the award may be so readily set aside on technical grounds.

The decisions in connection with cases where the assessment of compensation has been dealt with by the Court appears to justify the view that such matters may well be left to the Court, when it is reasonably certain that the matter will be dealt with equitably and in accordance with well-established principles. One exception should be made to this statement, namely, that if the parties agree that the only matter in dispute under the contract is the amount of compensation to be paid by one party to the other, there would

appear to be no reason why the parties should not agree that the amount of such compensation should be assessed by valuers as indicated above, and not by arbitration.

As to the basis on which compensation should be assessed see "Measure of Compensation", *supra*, p. 268.

Law Society's Special Condition.

9.—(1) The property [Each lot] is believed to be and shall be taken as correctly described as to quantity and otherwise, and any error, omission or misstatement found in the particulars, sale plan, if any, or conditions shall not annul the sale, or entitle any purchaser to be discharged from his purchase, nor shall the Vendor or any purchaser claim or be allowed any compensation in respect thereof: Provided that nothing in this condition shall entitle the Vendor to compel the purchaser to accept, or the purchaser to compel the Vendor to convey, property which differs substantially whether in quantity, quality, tenure or otherwise from the property agreed to be sold and purchased.

(2) This condition shall take effect in substitution for Clause 31 of the General Conditions.

It will be seen that the above condition is alternative to General Condition No. 31, and that its general purport is that whatever the nature of the error or misstatement on the particulars of the property, sale plan or conditions, no compensation is to be allowed to the vendor or the purchaser. Although there is a proviso stating that the vendor cannot be compelled to convey and the purchaser cannot be compelled to accept property differing substantially from the property agreed to be sold, this also appears to be the position under such a condition containing no such proviso, as to which see under "*Condition precluding compensation to either party*", above.

The writer's experience is that the effect of embodying this special condition in one of the sections which must, of necessity, be referred to and completed by the solicitor acting for the vendor is that special importance is attached to the fact that the Law Society sanction such a condition, and not only is this condition permitted to remain, but in general the vendor's solicitor resists its deletion. The writer ventures to submit that General Condition No. 31 is more equitable. If it is considered necessary to provide an alternative form for use by vendors who may, in special

circumstances, find it necessary to employ such a condition, it is respectfully suggested that the following course might be followed:—

(i) This special condition might be relegated to the footnotes and/or

(ii) The view might be expressed that such a clause may operate very harshly and should not normally be employed. If authority be required in support of this view it is to be found in the observations of Eve, J., in *Curtis Moffat, Ltd.* v. *Wheeler*, [1929] 1 Ch. 253, and see the late Mr. T. Cyprian Williams' *Contract of Sale of Land*, pp. 129 and 130. The writer does not overlook the fact that the rigour of this clause is slightly lessened by the proviso, but feels that the principle at the root of the clause is inequitable.

Framing special conditions as to defects.

Ambiguous conditions will generally be construed in the manner most advantageous to the purchaser: *Seaton* v. *Mapp* (1846), 2 Coll. 556; *Symons* v. *James* (1842), 1 Y. & C. C. Cas. 487; *Osborne* v. *Harvey* (1842), 12 L. J. Ch. 66.

If the facts are clearly stated it is not in general essential also to state the legal effect of those facts: *Smith* v. *Watts* (1858), 4 Drew. 338. But this rule is not absolute, for if in the particular circumstances the result of the fact stated is that the vendor has no title but this inference would not be drawn by an ordinary purchaser, the condition will not avail the vendor: *Williams* v. *Wood* (1868), 16 W. R. 1005; *Re Cumming to Godbolt* (1884), 1 T. L. R. 21. So if a purchaser might reasonably conclude from a condition as drawn by a mortgagee vendor that he had a power of sale, the vendor must establish that he had such a power, and cannot rely upon a condition which merely states that no objection is to be taken on account of the fact that the mortgagor did not concur in the sale when the vendor exercised the power: *Cruse* v. *Nowell* (1856), 25 L. J. Ch. 709.

If the condition is to be effective it must not only state clearly the defect in the title but must also provide that the purchaser shall not make any requisition or raise any objection to the title on account of the facts stated, otherwise the purchaser is entitled to assume that the vendor will do what is necessary to put the title in order, if it is a matter which is capable of being remedied.

Sometimes a condition, after stating the defect, informs the purchaser of the steps which will be taken to remedy it. Generally, such conditions are inserted because the steps in question will not be the whole of the steps which might be required by a purchaser

under an open contract. It should always be remembered that if the steps mentioned might be effective to put the defect of title in order the purchaser is entitled to assume that they will be so: *Mosley* v. *Hide* (1851), 17 Q. B. 91.

If the conditions of sale suggest that the vendor is selling the whole of his estate, and restricting the user of the various lots in a specified manner, a purchaser who buys one of the lots for a particular purpose may refuse to proceed with the purchase if the vendor has in fact reserved land out of the sale. In *Baskcomb* v. *Beckwith* (1869), 8 Eq. 100, the purchaser refused to complete unless the vendor agreed to restrict the user of the land so as to prevent the erection of a public-house upon it (the conditions stating that no public-house should be erected on the various lots). The Court upheld the purchaser's contentions.

In a case decided in 1906 property was sold as freehold. The conditions required the purchaser to assume that a certain lease for 500 years at a rent of one shilling had been enlarged into a fee simple by a deed executed in 1902. It was also stated that the property had been assigned in 1828 free from the rent and that the vendor had never paid the rent. It was not disclosed that between 1828 and 1902 the property was referred to in certain title deeds as being held at the one shilling rent. It will be seen that there was nothing misleading in the facts stated, although certain further evidence was available. It would, however, be clear to any purchaser that there would probably have been dealings between 1828 and 1902, and no representation was made by the vendor as to the intermediate period. The Court considered that the vendor might reasonably have thought that the rent had been released and that the facts stated were sufficient: *Blaiberg* v. *Keeves*, [1906] 2 Ch. 175. It is suggested that the Court was probably considerably influenced by the fact that the rent had not been paid for upwards of fifty years, and that there was no definite evidence that it had ever been paid.

It has been said that if a condition is obviously framed to cover a defect known to the vendor, then, if it is aptly worded and not misleading, it is effective even if it does not state the exact defect: *Re Sandbach and Edmondson's Contract*, [1891] 1 Ch. 99. If this be so the *dicta* in some of the older cases go too far. For example, Kindersley, V.-C., in *Cruse* v. *Nowell* (*supra*) observed that special conditions should show to what extent the purchaser is to be affected. It is felt that the majority of the more recent decisions tend to show that if the statements made by the vendor are clear, the purchaser cannot after investigating the title effectively withdraw from the contract by pointing to other relevant

matters not mentioned by the vendor in the conditions, but which could readily have been brought out by further inquiries, unless, of course, the result is to show that the vendor's statement is untrue or deceitful and misleading. Very often it is clear on the face of the condition that the purchaser is not being given the *whole* of the facts, and that the conclusion which the purchaser is required to draw does not necessarily follow from the facts disclosed. It is then a simple matter for the purchaser to ask further questions or to refuse to accept the condition. If he chooses to accept the condition without making further inquiries it seems difficult to suggest that he should be relieved from the contract if, after considering the whole of the preceding and subsequent events and documents disclosed by the abstract of title, he comes to the conclusion that he would not have accepted the condition if he had seen the abstract first. His proper course is either to refuse to accept the condition or to require further information. Generally the wisest course is to ask for the abstract of the title for consideration. This request is seldom refused. Notwithstanding these observations, it is to be recommended that the fullest disclosure of defects should be made or offered in all conditions in which it is sought to debar the purchaser from raising an objection to any material defect. If the vendor cloaks the defect by couching his condition in terms which do not convey clearly to the purchaser the real flaw in the title, he cannot reasonably complain if the Court refuses to enforce the contract, or permits the purchaser to rescind it.

FORFEITURE OF DEPOSIT AND RESALE.

The deposit.

The deposit serves two purposes. If the purchase is completed it is part of the price; but meanwhile it serves as a token that the purchaser means business: *Howe* v. *Smith* (1884), 27 Ch. D. 89; *Ex p. Barrell* (1875), L. R. 10 Ch. 512; *Soper* v. *Arnold* (1889), 14 App. Cas., at p. 435. Assuming that a valid contract is created, the purchaser cannot generally recover any part of the deposit if he defaults under the contract, since it is regarded as a sum agreed upon by the parties as " earnest money " to be forfeited by way of damages in the case of default: *Wallis* v. *Smith* (1882), 21 Ch. D. 243; *Collins* v. *Stimson* (1883), 11 Q. B. D. 143. It is not necessary that the contract should contain a provision to the effect that the deposit is to be forfeited in the event of the purchaser's default. The fact that the sum has been paid as a deposit is sufficient: *Hall* v. *Burnell*, [1911] 2 Ch. 551; *Re Parnell* (1875), 10 Ch. App.

512. Unless it is so agreed the deposit is not the measure of damages as between the vendor and the purchaser, nor can the purchaser avoid specific performance by forfeiting the deposit. "A purchaser has no right to say that he will put an end to the agreement, forfeiting his deposit": *per* Lord Eldon in *Crutchley* v. *Jerningham* (1817), 2 Mer. 502.

The distinction between a deposit and an agreed sum to be paid as "penalty" or as "liquidated damages" is really very clear-cut, although at first sight the cases appear to be a little difficult to reconcile. The essential point is that if the sum in question is a deposit it must either have actually been deposited in cash, or it must have been agreed that it should be deposited: *Wallis* v. *Smith* (1882), 21 Ch. D., at p. 255; *Hinton* v. *Sparkes* (1868), L. R. 3 C. P. 161. Even if the purchaser merely gives a promissory note or I.O.U. for the amount of the proposed deposit and does not honour his obligation, he cannot escape liability on the ground that no deposit has in fact been made: *Cleave* v. *Moore* (1857), 28 L. T. (o.s.) 255. In such a case, if the purchaser makes default the vendor will be entitled to judgment for the full amount of the deposit, even if it is in excess of the actual amount of the loss suffered by the vendor: *Hinton* v. *Sparkes* (*supra*). The facts as well as the special terms of the contract may be considered in order to determine whether a sum agreed to be paid as liquidated damages on breach of the agreement is recoverable. In one case a "deposit" of £5,000 was to be paid as to £500 on exchange of contracts, and the £5,000 if paid was to be forfeited, or if not paid was to be paid as liquidated damages in the event of a substantial breach of the contract. The £500 was not paid on exchange of contracts and the purchaser failed to complete the purchase. It was ingeniously argued that the Condition referring to a "substantial" breach included the failure to pay the £500 deposit on exchange of the contract. If this contention had been accepted by the Court then the position would have been that upon the failure to pay a sum of £500 there was to be a payment of £5,000. Such a provision would have been contrary to the well-established rule that a stipulation for forfeiture of a larger sum upon failure to pay a smaller is void: see *Kemble* v. *Farren* (1829), 6 Bing. 141. It was, however, held that the parties had not contemplated that the deposit might not be paid, and that therefore the failure to pay it was not a "substantial" breach of the contract within the meaning of the Condition which provided for the payment or forfeiture of the £5,000 as liquidated damages. Accordingly the vendor was awarded the sum of £5,000 as liquidated damages: *Wallis* v. *Smith* (1882), 21 Ch. D. 243.

Again, the terms of the contract may be such that the right of the vendor to retain the deposit is lost. Thus if a sum of £300 be paid as a deposit and in part payment of the purchase price, and the contract contains no provision for forfeiture of the deposit if the purchaser defaults, but contains a provision that either party making default shall pay to the other £1,000 as liquidated damages, this provision displaces the presumption that the £300 deposit is to be forfeited: *Palmer* v. *Temple* (1839), 9 Ad. & El. 508. The importance of this point will be seen best where the original vendor resells without loss, or at a profit. This fact would not prevent him from retaining the deposit even in the absence of any condition as to forfeiture; but the fixing of £1,000 as liquidated damages in the event of default by the purchaser might well be held to be penal and unenforceable in such a case. The result would then be that if a deposit of say £300 had been paid the vendor would have been obliged to return it, although he would not have been bound to do so in the absence of a provision fixing the amount payable as liquidated damages: *Ex p. Hunter* (1801), 6 Ves. 94; *Hinton* v. *Sparkes* (1868), L. R. 3 C. P. 161.

In another case the facts were as follows. A property was sold for £9,000, a deposit of £900 being paid. The contract provided that if either party should refuse to perform the agreement he or she was to pay to the other £500 as agreed damages, and in case of default by the purchaser the deposit "to be forfeited in part of such damages". The purchaser defaulted. Hawke, J., held that the intention of the parties was that the defaulter was to be the sufferer up to £500, and that the balance of £400 must be repaid to her: *Sennett* v. *Rendell* (1935), 79 *Law Journal* (Newspaper) 98.

According to the law in force prior to 1926, where the Court refused to order specific performance on account of a defect in the title it was unable to order the return of the deposit if the conditions of sale were sufficient to cover the defect. See, *e.g.*, *Re Scott & Alvarez*, [1895] 2 Ch. 603. Having regard to the provisions of section 49 of the Law of Property Act, 1925, many of the earlier decisions as to the right of the vendor to retain the deposit in such cases are now of doubtful authority. If the purchaser without lawful excuse makes default in the main obligations of the contract it is clear that the vendor may forfeit the deposit: *e.g.*, if the purchaser cannot find the purchase money within a reasonable time after the date fixed for completion: *Howe* v. *Smith* (1884), 27 Ch. D. 89. There may, however, be many cases where the position is not so clear. It certainly cannot be stated that whenever specific performance is claimed by the vendor but is

refused by the Court the return of the deposit will be ordered; but recent decisions tend to show that the Court will normally order the return of the deposit in such cases : see *The Conveyancer*, Vol. I, pp. 310—311.

At what stage does forfeiture arise? Obviously if the purchaser wrongfully repudiates the contract the vendor's right to declare the deposit to be forfeited must arise immediately, even if the date for completion has not arrived : cf. *Hochster* v. *de la Tour* (1853), 2 E. & B. 678; *Frost* v. *Knight* (1872), L. R. 7 Ex. 111. If there is no repudiation but the purchaser does not in fact implement his contract, when can the contract be declared to be forfeited? This must depend upon whether time is of the essence of the contract. If it is the vendor's right to declare the deposit forfeited arises immediately the date for completion of the purchase has passed.

Where time is not of the essence of the contract it is established by the authorities that there must be such a delay as to warrant the inference that the purchaser is not completing the purchase. There must be a very clear inference from the facts, or the Court will not permit the forfeiture. In *Howe* v. *Smith* (1884), 27 Ch. D. 89, there was a building contract under which a sum of £500 was paid as a deposit and in part payment of the purchase price. The purchase was due for completion on April 24, but the vendor was not to resell for a further six weeks after that date. The vendor subsequently agreed (on June 20) to extend the completion date for a further month. The purchaser still being in default after that date the deposit was held to be forfeited.

On the other hand, *Cornwall* v. *Henson*, [1900] 2 Ch. 298, is a very good illustration of the rule that where time is not of the essence of the contract and the vendor does not serve a notice requiring the purchaser to complete within a reasonable specified time, the contract will run on indefinitely. In that case the agreement provided for payment of a deposit, which was duly paid, the balance of the purchase price being payable by twelve equal quarterly instalments; but if default were made for a certain period in paying any instalment the whole of the balance became due and the vendor was to be at liberty to resell and to retain out of the proceeds the unpaid instalments with certain interest, and was to pay the balance to the purchaser. By a certain date the vendor had paid all instalments except one. The vendor did not give notice to the purchaser rescinding the contract. Nearly three years later the purchaser, who had disappeared for two years, returned and offered to pay the final instalment. The vendor refusing to accept it the purchaser brought an action for specific performance. He succeeded in recovering damages; for

the Court held that mere delay without evidence of abandonment of the contract by the purchaser or repudiation of it by the vendor was not sufficient to cancel the contract. However, the purchaser had obviously been guilty of serious laches and had not acted in such a manner as to satisfy the Court that it was equitable to enforce the contract. Actually it would have been difficult to enforce the contract according to its tenour in the circumstances. Some eighteen months after the purchaser disappeared the vendor had let the property for a term of three years. The total price was £150 and the final instalment was approximately £9. The Court assessed the damages at £125.

If a sum is paid on account of the purchase price and not as a deposit, and the purchaser makes default the vendor cannot retain the sum so paid to meet any possible loss on the resale of the property. Upon rescinding the contract the vendor must therefore return to the purchaser any such sum in the absence of any condition to the contrary. A provision that the vendor may resell and recover any loss on the resale from the purchaser will not affect this rule : *Harrison* v. *Holland*, [1922] 1 K. B. 211.

Once the deposit is forfeited the purchaser cannot recover it by showing that the vendor had no title to the property : *Soper* v. *Arnold* (1889), 14 App. Cas. 429.

It is not possible in the space available here to deal with the distinction between deposits strictly so called and payments on account of the purchase price, and the question whether a sum payable upon default is by way of penalty or liquidated damages, or to deal with the doctrine of part performance as affecting the recoverability of the deposit. It is hoped that it may be possible to discuss these matters in a separate article in a subsequent issue.

Power of resale.

If the condition provides only that the vendor may resell the property but contains no stipulation that any deficiency on a resale shall be made good by the purchaser, what is the position?

Some little authority is to be found for the view that a vendor operating under such a condition may recover the deficiency on a resale; but this point was expressly left open by the Court of Appeal in *Harold Wood Brick Co., Ltd.* v. *Ferris*, [1935] 2 K. B. 198. At the same time the omission of such a stipulation does not appear to put the vendor under any disadvantage from a practical angle.

In *Harold Wood Brick Co., Ltd.* v. *Ferris, supra*, where such a limited condition was employed, it was pointed out that the

forfeiture clause in the Lord Chancellor's Statutory Conditions of Sale is in similar form.

Roche, L.J., considered that—

(1) The vendor having been entitled to treat the contract as broken, and having done so, was entitled to maintain his action for damages.

(2) The vendor did not require to nor did he avail himself of the stipulations in the clause but proceeded on his common law right irrespective of that clause.

In the result, therefore, unless the vendor complicates matters by expressly purporting to resell in exercise of the stipulation contained in the contract he can recover any deficiency which results upon a resale of the property by exercising his common law right and accepting the purchaser's conduct as amounting to repudiation of the contract. It is unfortunate that no reference was made in the judgments of the Lords Justices in the *Harold Wood Brick Co. Case* to the observations of Fry, L.J., in *Howe* v. *Smith* (1884), 27 Ch. D. 89, as follows : " Where there has been such default as justifies the vendor in treating the contract as rescinded, such default affords the vendor an alternative remedy, so that he may either affirm the contract and sell under this clause, or rescind the contract and sell under his absolute title." (In that case the condition provided that the vendor could resell and recover any deficiency on a resale.) Fry, L.J., proceeded : " If he act under the clause he must bring the deposit into account in his claim for the deficiency; if he sell as owner, he may retain the deposit, but loses his claim for the deficiency under the clause in question."

The last statement indicates that if the vendor chooses to resell as absolute owner, treating the contract as rescinded, he cannot recover damages *under the stipulation in the contract.* This proposition is by no means denied. Nevertheless it may be misleading. It seems to have been reasonably well settled, even in 1884, that a vendor, selling after default by the purchaser, could, in the absence of any condition, recover not only his expenses but also any loss on resale by way of damages, subject to bringing into account the deposit: *Icely* v. *Grew* (1836), 6 Nev. & M. (K. B.) 467; and see *Noble* v. *Edwardes* (1877), 5 Ch. D. 378; *Essex* v. *Daniell* (1875), L. R. 10 C. P. 538. And the vendor may elect to rely on this common law right, even if there is an express power in the contract to resell and recover the deficiency (*Icely* v. *Grew*, *supra*), or merely an express power to resell (without any reference to the recovery of the deficiency on a resale) : *Harold Wood Brick Co.* v. *Ferris*, *supra.* In such cases the vendor recovers damages for breach of contract by the purchaser.

In the various editions of *Williams on Vendor and Purchaser* a clear-cut distinction has been taken between the following cases :—

(a) Essential breach by purchaser amounting to repudiation followed by an election by the vendor to affirm the contract and to claim damages for its breach.

(b) Similar breach by purchaser; but vendor elects to rescind the contract. The view is maintained throughout the various editions of *Williams on Vendor and Purchaser* that in this case the vendor is entitled only to be restored to his former position, and that if he then resells as owner " for a higher price such purchase money is all his own; and if the resale produces less than the former contract price, he must bear the loss himself ".

It seems difficult to deny that where a party elects to rescind a contract he cannot obtain damages for its breach. In *Henty* v. *Schröder* (1879), 12 Ch. D. 666, Jessel, M.R., refused to make an order for rescission of the contract and damages for its breach, being of the opinion that the vendor could not have damages as well as rescission. Yet the distinction between (i) treating an essential breach of the contract as a repudiation and suing on the basis that the contract is at an end, and (ii) rescinding the contract on account of the breach, is extremely fine.

It is contended in *Williams on Vendor and Purchaser* that if the vendor has once elected to rescind the contract " he can no longer claim to treat it as subsisting and recover damages for its breach ". But may there not be an intermediate position—illogical perhaps, but warranted by authority. In *Mayson* v. *Clouet*, [1924] A. C. 980, Lord Dunedin said : " The law is quite plain. If one party commits a breach then if that breach is something that goes to the root of the contract the other party has his option. He may still treat the contract as existing and sue for specific performance; or he may elect to hold the contract as at an end—*i.e.*, no longer binding on him—while retaining the right to sue for damages in respect of the breach committed."

Again, in the old leading case of *Frost* v. *Knight* (1872), L. R. 7 Ex. 111, which dealt with the wrongful repudiation by one party before the due time for performance of the contract, it was pointed out that the promisee may " treat the repudiation as a wrongful *putting an end to the contract*, and be entitled to such damages as would have arisen from the non-performance of the contract at the appointed time ". It is also pointed out in that case that if the promisee merely stands by " he keeps the contract alive for the benefit of the other party as well as his own ". See also

Cornwall v. *Henson*, [1900] 2 Ch. 298, where the vendor failed to advise a defaulting purchaser that he was treating the contract as abandoned if the purchase price were not paid, and was held liable in damages on dealing with the property contrary to the contract. Since the vendor has an option he must perform some act of election to put an end to the contract. He may say : " I elect to treat your conduct as a repudiation putting an end to the contract." It is then clear that he is entitled to recover damages for the breach. He may, however, say : " I rescind the contract on account of the breach, and I claim damages for the breach." If he follows this course, it will have been observed that the view expressed in *Williams' Vendor and Purchaser* is that no damages can be recovered, as the vendor is not suing " in affirmance " of the contract. Yet it may be doubted whether there is any " affirmance " of the contract where the vendor openly states that he accepts the purchaser's action or default as putting an end to the contract. Although in *Harold Wood Brick Co.* v. *Ferris*, [1935] 2 K. B. 198, the vendor's solicitors stated that they were instructed to give notice rescinding the contract, they also stated that the purchaser would be held liable in damages in respect of his breach of the agreement. If rescission by the party aggrieved deprives that party of the right to recover damages the decision of the Court of Appeal may perhaps be supported on the ground that the notice could be read as an intimation that the claim was for breach of a subsisting contract. It does, however, seem difficult to accept the view that the vendor was affirming the contract. It is true that there was in the *Harold Wood Brick Co. Case* a condition enabling the vendor to rescind and resell on default; but the Court expressly decided the case on common law principles, and ignored the condition, so that the notice must be deemed to have taken effect as if there had been no such condition.

In *Seaborne's Vendor and Purchaser* the vendor's right to rescind and to claim damages in respect of repudiation by the purchaser is assumed to be an exception to the general rule that a vendor claiming damages must plead that he is ready and willing to convey the property (9th edition, p. 279).

In view of the decision in *Henty* v. *Schröder*, 12 Ch. D. 666 (above mentioned), followed in *Hutchings* v. *Humphreys*, 54 L. J. Ch. 792, it is suggested that a vendor who desires to rely upon his *common law* right to damages, after an essential breach by the purchaser amounting to repudiation, will be well advised to refrain from serving notice rescinding the contract, and to confine himself to an intimation to the purchaser that the purchaser's conduct

amounts to repudiation and that he will claim damages for such repudiation.

Rescission and forfeiture of the deposit.

Formerly a party who desired to obtain damages for the breach of the contract was bound to obtain a judgment for specific performance before damages could be awarded. "Now he may come to the Court and say: 'If you think I am not entitled to specific performance or any part of the agreement, then give me damages,'" *per* Kay, J., in *Elmore* v. *Pirrie* (1887), 57 L. T. 333. The vendor should claim damages in the alternative, but amendment may be allowed if it is not so claimed: *Serrao* v. *Noel*, 15 Q. B. D. 549.

The vendor may be content with the deposit by way of damages, but may find it necessary to clear the title in order to resell.

In that case he need not take proceedings for specific performance but may claim rescission of the contract and forfeiture of the deposit. Whatever may be the effect of rescission upon the vendor's right to recover damages, it is clear that the Court may order rescission of the contract and forfeiture of the deposit: *Hall* v. *Burnell*, [1911] 2 Ch. 551; *Farrant* v. *Olver* (1922), 127 L. T. 145. It should not be forgotten that where the purchaser's breach consists only of the failure to complete, it may be necessary to make time of the essence by giving to the purchaser notice (adequate in point of time) requiring the purchaser to complete the purchase within a specified time, notwithstanding that the date for completion has passed.

It is now convenient to consider the effect of the Law Society's Condition relating to forfeiture of the deposit and resale.

Law Society's Condition.

32.—(1) If a purchaser shall fail to perform his part of the contract, the vendor may give to the purchaser or to his solicitor at least fourteen days' notice in writing specifying the default and requiring the purchaser to make good the same before the expiration of the notice.

(2) If the purchaser does not comply with the terms of the said notice—

(a) the deposit money, if any, shall be forfeited to the vendor, or, in the case of settled land, to his Settled Land Act trustees;

(b) the vendor may resell the property without previously tendering a conveyance to the purchaser;

(c) the contract shall, without prejudice to the vendor's right to resume possession (if given up) and recover documents belonging to him, become void, save and except that the following provisions shall apply.

(3) Any resale may be made by auction or private contract, at such time, subject to such conditions, and in such manner generally, as the vendor may think proper.

(4) If on such resale the vendor shall incur a loss within one year from the date fixed for completion by reason of diminution of price, the defaulting purchaser shall pay to the vendor, or, in the case of settled land, to his Settled Land Act trustees, the amount of such loss, as liquidated damages, receiving credit for the deposit (if any); but any surplus money arising on a resale shall be retained by the vendor, or, in the case of settled land, by his Settled Land Act trustees.

(5) On any resale or attempted resale by auction—

(a) the property may be bought in;

(b) all expenses consequent on an unsuccessful attempt, made in good faith within the said year, to resell, shall be forthwith paid to the vendor, or, in the case of settled land, to his Settled Land Act trustees, by the defaulting purchaser as liquidated damages, after receiving credit for the deposit.

Condition 32 (1).

When serving a notice under this paragraph it must be remembered that, in equity, in relation to completion time is not normally of the essence of the contract. Further, " stipulations in a contract, as to time or otherwise, which according to rules of equity are not deemed to be or to have become of the essence of the contract, are also construed and have effect at law in accordance with the same rules " : Law of Property Act, 1925, s. 41.

As to cases in which the period fixed for completion is of the essence of the contract, see *The Conveyancer*, Vol. I, p. 21, and, upon this question generally, *ibid.*, pp. 20—25.

There appears to be no case which decides the neat question whether the giving of the notice here contemplated will so operate as to make time of the essence of the contract, and to prevent the purchaser from obtaining specific performance if he fails to complete the purchase within fourteen days after receiving the notice. It is submitted that the cases clearly establish that a notice intended to make time of the essence must be reasonable

in point of time having regard to all the circumstances : *Stickney* v. *Keeble*, [1915] A. C. 386; and see *The Conveyancer*, Vol. I, pp. 23—25.

In *Green* v. *Sevin* (1879), 13 Ch. D. 589, Fry, J., observed : " Time not being of the essence of the contract originally it cannot be made so by the volition of the parties. There must have been such improper conduct on the part of the other as to justify the rescission of the contract *sub modo*, that is if a reasonable notice be not complied with." In *Taylor* v. *Brown* (1839), 2 Beav. 180, at p. 183, Lord Langdale stated that this right arose in the case of " unnecessary delay ", and again in *King* v. *Wilson* (1843), 6 Beav. 124, he said : " Where there is great and improper delay on one side the other party has a right to fix a reasonable time within which the contract is to be completed." In *Pegg* v. *Wisden* it was laid down that time might be made of the essence of the contract by notice " in the case of improper delay ". Fry, J., in *Green* v. *Sevin*, *supra*, approved the following passage in Lord St. Leonards' work on *Vendor and Purchaser* : " If either party is guilty of delay, a distinct written notice by the other that he shall consider the contract at an end if it be not completed within a reasonable time to be named, would be treated in equity as binding on the party to whom it is given." In most of the leading cases there had in fact been very considerable delay. It is for this reason that the impression at first created is that " substantial " delay is necessary before time can be made of the essence by notice. It is submitted that the rule is correctly laid down by Lord St. Leonards in the passage above cited, it being understood that delay means " unjustifiable " (and therefore unreasonable) delay, but not necessarily " substantial " delay.

It may well happen that, owing to the purchaser's delay in delivering requisitions, and the vendor's courtesy in extending the time, the replies to requisitions are only delivered after the date for completion has passed. If the vendor were in a position, immediately after replying to the requisitions, to require the purchaser to complete within fourteen days thereafter under penalty of forfeiture of the deposit and of the benefit of the contract it is clear that injustice might result in certain circumstances : see *Green* v. *Sevin* (1879), 13 Ch. D. 589.

It must be remembered that in relation to completion time is not normally of the essence of the contract. Moreover " stipulations in a contract, as to time or otherwise, which according to rules of equity are not deemed to be or to have become of the essence of the contract, are also construed and have effect at law

in accordance with the same rules " : Law of Property Act, 1925, s. 41.

It is suggested that whilst a fourteen days' notice is no doubt effective where it is clear that the necessary steps can be conveniently taken within that period, a vendor will be well advised in other cases to give a suitably longer notice.

The following cases illustrate the observations above made. In each of these cases the notice was held to be insufficient :—

(a) Vendor delays for two years and then calls on the purchaser to complete within three weeks : *Green* v. *Sevin* (1879), 13 Ch. D. 589.

(b) Vendor takes over six weeks to deliver the abstract of title and then requires completion within six weeks : *Pegg* v. *Wisden* (1852), 16 Beav. 239.

(c) Vendor allows matters to rest for three months after delivery of abstract. Notice requiring completion within five weeks. The title was complicated and requisitions not yet delivered : *Crawford* v. *Toogood* (1879), 13 Ch. D. 153.

A condition contained in the Statutory Conditions of Sale and which is similar in form to Condition 32 (1) of the Law Society's Conditions was criticised by the late Mr. Cyprian Williams : see *Williams' Contract of Sale of Land*, p. 91; *Vendor and Purchaser* (4th ed.), p. 1235. The point of Mr. Williams' criticism appears to be as follows :—

(1) Such a condition is disadvantageous to the purchaser because it delays the vendor's remedies for a further fourteen days after he has become entitled to exercise those remedies.

(2) Mr. Williams argues that the purchaser must first have been guilty of *unreasonable* delay (and not merely delay) before a breach of the contract is committed where time is not of the essence. This contention is in conformity with *dicta* in certain cases. It has been said that where time is not originally of the essence and there is no unreasonable delay or negligence of the vendor in answering requisitions the purchaser cannot make time of the essence by a notice requiring completion within a limited time : *Wells* v. *Maxwell* (1863), 32 Beav. 408 (but in that case it seems clear that the period of notice was unreasonably short in the circumstances); cf. *King* v. *Wilson* (1843), 6 Beav. 124 (notice after " great and improper delay "); *Green* v. *Sevin* (1879), 13 Ch. D. 589 (default or unnecessary delay requisite before notice making time of essence); *Stickney* v. *Keeble*, [1915] A. C. 386. None of the cases appear to establish clearly that there must be *substantial* delay

by the purchaser or vendor before the other party can serve a notice making time of the essence. The difficulty arises from the fact that the contract is assumed to be on the basis that the parties will complete within a reasonable time after the date fixed for completion; and neither party can, by giving notice, alter the contract by fixing such a time as he considers sufficient for the completion. It is for the Court to decide whether the notice is reasonable in point of time in all the circumstances. Whilst there appears to be no case deciding that the vendor or purchaser cannot serve such a notice immediately after the date for completion has passed, it would appear that the answer to this question must depend upon what is "a reasonable time after the date fixed for completion". There may well be cases in which a fourteen days' notice could properly be served a day or two after the date fixed for completion, *e.g.*, where the title was clear and the assurance to the purchaser executed in readiness for completion.

(3) Mr. Williams further contends that once there has been unreasonable delay a breach is committed and there is no need to give any notice before the vendor pursues his remedies. It is, however, difficult to accept this argument in relation to any claim by the vendor to treat the contract as repudiated by the purchaser. In *Stickney* v. *Keeble*, *supra*, it was laid down that where time is not of the essence the purchaser may serve on the vendor a notice fixing a reasonable but limited time for completion, in default of which the purchaser will treat the contract as at an end. Similarly, "Equity would not assist where there had been undue delay on the part of one party to the contract and the other had given him reasonable notice that he must complete within a definite time": *per* Lord Haldane in *Jamshed Khodaram Irani* v. *Burjorji Dhunjibhai* (1915), 32 T. L. R. 156 (P. C.).

Again, in *Cornwall* v. *Henson*, [1900] 2 Ch. 298, the Court refused to treat the contract as repudiated by the purchaser in spite of about two years' delay by the purchaser and a dealing with the property by the vendor in the meantime, on the ground (*inter alia*) that the vendor had never given notice to the purchaser that he would treat the contract as abandoned if payment were not made. The necessity of serving notice on the purchaser in case of default seems therefore to be established. The writer finds it difficult to reconcile Mr. Williams' criticism of such Conditions as

No. 32 (1) with the statement on another page of *Williams' Vendor and Purchaser* that "When either party makes delay in performing his part of the agreement, the most prudent course for the other is to serve a notice upon him making time of the essence of the contract. . . . If after service of such a notice the party in default fails to do the required act within the time so limited, the other party will then be entitled to treat the contract as broken": 4th ed., p. 991. Mr. Williams' criticism appears to be based on an observation of Sargant, J., in *Farrant* v. *Olver*, [1922] W. N. 47; 127 L. T. 145, but which must be read in relation to its context and the facts of the case. There the purchaser had *persistently refused* to complete the purchase and a long period had elapsed since the date for completion, so that this was really a case of repudiation by the purchaser entitling the vendor to treat the contract as at an end. The remaining point of difficulty is whether a fourteen days' notice (when stipulated for in the contract) is *in all circumstances* reasonable and therefore effective. Such a condition can only be made certain in its effect by an express statement that time shall be of the essence of that condition. It seems doubtful whether a special condition to that effect would prove generally acceptable, and it might be more desirable to amend this condition by extending the period to twenty-one days or, preferably, by providing that the period of the notice shall be such as is reasonable having regard to all the circumstances. The latter provision indeed appears to state the true position in law. If, as is submitted, the condition (as it stands) will not be effective unless the period of fourteen days is in fact a reasonable period for the making good of the purchaser's default, it might be better to provide only for a reasonable period of notice.

It is thought that there will be few cases in which a vendor will serve a notice prior to the date fixed for completion, since this may have the effect of extending the date for completion, quite apart from the fact that the vendor (who is really only concerned with the payment of the purchase price on the due date) might then have to serve a further notice after the date for completion arrives. It is also thought that for the same reason a vendor would hardly ever serve a notice under the condition in connection with the purchaser's failure to deliver requisitions as suggested in *Williams' Vendor and Purchaser* (4th ed.), at p. 1236.

Assuming that the notice is duly served at a reasonable period after the date fixed for completion and is reasonable in point of time, the result will be that unless the purchaser makes good his default and completes the purchase, the vendor may proceed under his rights at common law to resell and may sue for damages in

respect of any deficiency irrespective of any other condition as to forfeiture of the deposit and resale : *Harold Wood Brick Co., Ltd.* v. *Ferris*, [1935] 2 K. B. 198. See further observations above under " Power of Resale ".

It would seem that the only default which it will normally be necessary to specify in the notice is the purchaser's failure to complete the purchase and to pay the balance of the purchase price.

Condition 32 (2).

(a) If the vendor rescinds the contract owing to the purchaser's default under an open contract it is clear that the deposit can be declared forfeit (*Howe* v. *Smith* (1884), 27 Ch. D. 89; *Hall* v. *Burnell*, [1911] 2 Ch. 551) subject to any exercise by the Court of its discretion under section 40 of the Law of Property Act, 1925. It is unlikely that such discretion would be exercised where the purchaser had been guilty of wilful default or unjustifiable delay.

In some cases the contract provides that if the purchaser fails to comply with any of the conditions the deposit is to be forfeited as liquidated damages. In that case, according to *Icely* v. *Grew* (1836), 6 Nev. & M. (K. B.) 467, upon a wrongful breach of the contract by the purchaser the vendor may nevertheless recover the true measure of damages in excess of the deposit, ignoring the condition. This decision is criticised in *Webster's Conditions of Sale* (3rd ed.), p. 420; but it is accepted without remark in *Williams on Vendor and Purchaser* (4th ed.), p. 1016. The point cannot be regarded as settled : see and compare *Lea* v. *Whitaker* (1872), L. R. 8 C. P. 70, and the observations above under " Liquidated damages or penalty? " It should be noted that in *Icely* v. *Grew*, *supra*, the condition provided also that the vendor could resell and recover any deficiency and the expenses of the resale. It is submitted that in the absence of such an additional provision the fixing of the amount of the deposit as the measure of " liquidated damages " would prevent the vendor from recovering any additional damages. Cf. *Lea* v. *Whitaker*, *supra*, and *Sennett* v. *Rendell* (1934), 79 Law Journal 98.

(b) The vendor may on rescinding the contract owing to the purchaser's default, resell at common law as owner, being remitted to his original rights; and the existence of a

special condition giving a power of resale does not affect this right: *Howe* v. *Smith*; *Hall* v. *Burnell*, *supra*.

In *Williams on Vendor and Purchaser* (4th ed.), p. 62, it is suggested that it is doubtful whether in the absence of express stipulation a vendor has the right to resell in case the purchaser makes default in performing the contract, notwithstanding the decision to that effect in *Noble* v. *Edwardes* (1877), 5 Ch. D. 378, 388. Mr. Williams considered that a resale in such a case did not rescind the contract, and that even if such a resale were unlawful the vendor could sue for any deficiency on the resale; but that if the resale produced a higher price the vendor must pay the excess to the purchaser, p. 63. The cases cited as authority for the latter part of this proposition do not appear sufficiently to support it, and in *Dart on Vendor and Purchaser* a contrary view is expressed. Mr. Williams did not deny that the vendor could recover damages for breach of the contract or that the measure of damages would be the difference between the contract price and "the value of the land as remaining on his hands at the date of the breach": *Vendor and Purchaser* (4th ed.), p. 1015.

The deficiency on a resale, after crediting the deposit, would therefore determine the amount of damages. If, however, the delay or other conduct of the purchaser amounts to a repudiation of the contract and the vendor notifies the purchaser that he treats his conduct as a repudiation of the contract then he lawfully puts an end to the contract subject only to his right to recover damages: *Mayson* v. *Clouet*, [1924] A. C. 980, *per* Lord Dunedin (*vide supra*). If such a course be followed it can hardly be suggested that the vendor is bound to account to the vendor for any profit made on a resale, for the contract is at an end: *Ex p. Hunter* (1801), 6 Ves., p. 97.

But if the vendor merely purports to resell on account of the purchaser's breach without either rescinding the contract or taking the course last indicated, then a difficult question of title arises if the doubts expressed in *Williams on Vendor and Purchaser* are justified. The sale may be unlawful, and thus the purchaser, if taking with notice of the prior contract, may not obtain a good title.

In any case, quite apart from the evidence that the original purchaser has forfeited his right to enforce the contract, the position may be complicated by registration of the prior contract as an "estate contract" under the Land Charges Act, 1925, or in the case of registered land by the entry of the contract on the register affecting the title at the Land Registry.

A purchaser is, of course, safe in ignoring any prior contract entered into after December 31, 1925, for the purchase of unregistered land, if not registered as an estate contract under the Land Charges Act, 1925: see L. P. Act, 1925, s. 199. If, however, such registration has been effected it would hardly be prudent for the purchaser to accept the title unless the land charge entry is cancelled. Not only might a resale be difficult, but it is unlikely that any intending mortgagee would be prepared to advance moneys whilst a prior contract remained registered under the Land Charges Act, 1925.

It will be noted that the Law Society's Condition No. 32 (2) (b) authorises the resale without tendering a conveyance to the purchaser. Generally, the vendor, suing upon the agreement, must have shown a good title and executed or been ready and willing to execute the necessary assurance: *Phillips* v. *Fielding* (1792), 2 H. Bl. 123; *Laird* v. *Pim* (1841), 7 M. & W. 474; *Poole* v. *Hill* (1840), 6 M. & W. 835, at p. 841; *Ellis* v. *Rogers* (1884), 29 Ch. D. 661.

But an agreement by the purchaser to pay the purchase price on a certain date coupled with an undertaking by the vendor to convey on payment of the price enables the vendor to sue for the purchase price although the conveyance has not been executed: *Yates* v. *Gardiner* (1851), 20 L. J. Ex. 327; *Ferry* v. *Williams* (1817), 8 Taunt. 62; *Wilmot* v. *Wilkinson* (1827), 6 B. & C. 506; *Mattock* v. *Kinglake* (1839), 10 Ad. & El. 50.

As, however, the vendor must aver that he was ready and willing to execute the necessary assurance, and as it is the duty of the purchaser to tender such assurance, it will generally be within the power of the purchaser to ensure that he is not compelled to pay the purchase price or liable in proceedings for non-completion, or to forfeit the deposit, without obtaining the necessary assurance of the property. The position may, of course, be affected by the wording of the contract. Thus, if the conditions provide that the purchaser will, against the execution by the vendor of the necessary assurance, pay the purchase price, the vendor may be compelled to tender a conveyance before he can claim the purchase price from the purchaser.

Condition 32 (3).

The provision that a resale may be made by auction or private contract subject to such conditions as the vendor may think proper was explained by Greer, L.J., in *Harold Wood Brick Co., Ltd.* v.

Ferris, [1935] 2 K. B. 198, as follows: "It could not be said by the person in default: 'If you had waited, and instead of selling by auction had sold by private contract you would have realised a larger price'; nor could it be said: 'You cannot recover as damages the difference between what you have received and what you would have received under the contract because you have inserted stipulations in the contract which you should not have inserted'."

The Court of Appeal in *Harold Wood Brick Co., Ltd.* v. *Ferris*, *supra*, refrained from expressing any view as to the effect of a condition which merely declares that on default the deposit shall be forfeited and that the vendor may resell, without stating that any deficiency on a resale shall be recoverable by the vendor. As, however, the learned Lords Justices held that such deficiency was recoverable, independently of the contract, at common law, the point appears to have little practical significance. (See the observations on this point above.)

Condition 32 (4).

Although by Condition 32 (2) (a) the deposit is referred to as "forfeited", it will be noted that credit must nevertheless be given for it in estimating the deficiency on a resale under Condition 32 (4). This is in conformity with the general rule as established in *Ockenden* v. *Henly* (1858), E. B. & E. 485.

Under a contract which provided for forfeiture of the deposit and recovery of the deficiency in price on resale, the vendor was required to give credit for the deposit although the condition did not so provide: *Shuttleworth* v. *Clews*, [1910] 1 Ch. 176, following *Ockenden* v. *Henly*, *supra*, and doubting *Griffiths* v. *Vezey*, [1906] 1 Ch. 796, which may be regarded as overruled.

In *Essex* v. *Daniell* (1875), L. R. 10 C. P. 538, where the condition gave the vendor the right to recover the expenses in relation to the original sale, it was held that such expenses could be recovered (in addition to the retention of the deposit) where the vendor did not resell. It was also suggested that this right existed apart from any condition: *ibid.*, p. 553. It seems doubtful whether *any* damages could properly be awarded unless the deposit is first brought into account, and it is shown that the vendor's loss exceeds the amount thereof. (See *Williams' Vendor and Purchaser* (4th ed.), p. 1016, note (*q*).) It appears that damages were fixed on the basis that the vendor was not reselling, but retaining the property, as he was fully entitled to do. Mr. Williams criticised

this decision upon the ground that the vendor would have had to pay the costs of the sale even if the purchase had been completed, and that the true measure of damages is the difference between the purchase price and the estimated value of the property after deducting the estimated costs of resale : *Contract of Sale of Land*, pp. 126, 127; *Vendor and Purchaser* (4th ed.), p. 1017. It will be found that the principle contended for by Mr. Williams works equitably. *E.g.*, (1) Purchase price £1,000 : costs of sale, say, £20—net amount receivable £980. (2) Valuation after default £800 : costs of sale would be, say, £16 = £784. (3) Loss is £1,000 less £784 = £216 (this being the recoverable amount). The vendor will then receive £216 and be left with a property realisable at £784 net = £1,000. But as the expenses of the original sale are £20, the net balance will be £980, which is the net amount which he would have received if the original sale had been completed.

But if the loss were estimated on the basis that the costs of the original sale were recoverable in addition to the deficiency (instead of the costs of the resale) the £16 would become £20, and consequently the ultimate balance will be £984, or £4 in excess of the net amount receivable on the original sale.

It is submitted that where the purchaser has made default, and no deposit has been paid, the vendor (retaining the property) is entitled to recover (by way of damages naturally flowing from the breach) the costs and commission in connection with the abortive sale : see *Essex* v. *Daniell*, *supra*, and the remarks of Baron Parke in *Robinson* v. *Harman* (1848), 1 Ex., at p. 855 (quoted with approval by Pollock, M.R., in *York Glass Co.* v. *Jubb* (1925), 134 L. T. 36. But the point is not covered by any direct decision. Possibly such a claim could be negatived if the purchaser could show that the property is in fact of a value in excess of the agreed price plus the expenses of a resale; but it seems unlikely that such a position would often arise in practice, unless it could be shown that the vendor was in fact reselling at an enhanced price.

If, however, the vendor seeks to forfeit the deposit, and to claim the expenses of the original sale, and/or any other damages, it would seem wrong in principle to award damages unless it is shown that the actual loss exceeds the amount of the deposit. In this respect *Essex* v. *Daniell*, *supra*, appears to be of doubtful authority in spite of the distinction taken by Lord Coleridge, C.J., between that case and *Ockenden* v. *Henly* (1858), E. B. & E. 485, upon the ground that in the latter case the deposit had not been paid. Moreover, in *Shuttleworth* v. *Clews*, [1910] 1 Ch. 176, the deposit had been paid and *Ockenden* v. *Henly* was followed.

Condition 32 (4) only enables a vendor who incurs a loss "by reason of diminution of price" to recover such loss. Therefore :—

(1) If the property be resold at the same price there is no such diminution and therefore nothing recoverable by the vendor.

(2) Neither the expenses of the original sale nor the expenses of resale are recoverable in any event as they are not a loss by reason of diminution of price.

(It will be seen that Condition 32 (5) enables the vendor to recover only the expenses of an *unsuccessful* attempt to resell by auction.)

It is true that if a ten per cent. deposit has been paid, the vendor, reselling at the same price and retaining the deposit, may be adequately compensated. But if the vendor resells at a substantially lower price he will recover only the difference between (1) the original purchase price and (2) the resale price (plus the original deposit, if any), and will be left to meet the expenses of the resale out of his own pocket. From the observations above made it will be seen that it is not clear whether the vendor would do any better in this respect by ignoring the condition and relying upon his rights at common law.

There would appear to be no reason to doubt the efficacy of the very usual condition under which the expenses of a resale are expressed to be recoverable in addition to the diminution of price. It would seem that the Law Society's condition could well be revised by incorporating such a provision. It would also seem desirable to make it clear that such expenses are to be deemed to include not only legal expenses but also the expenses incidental to any auction sale at which the property is sold and, in addition, commission payable on such sale whether the property is sold by public auction or private treaty.

Condition 32 (5).

Paragraph (5) of Condition 32 does not enable the vendor to recover the expenses of a successful attempt to resell by public auction, or of any attempt, successful or otherwise, to sell by private treaty. It would appear to be desirable in connection with any condition permitting the vendor to recover the expenses of a sale or attempted resale to state whether expenses in relation to advertising, preparation of plans, legal charges, and surveyors' fees in relation to matters prior to the sale, and commission in the event of a sale, are to be recoverable in addition to the auctioneer's fee for preparing for and conducting the sale. Such expenses would appear to flow naturally from the purchaser's breach of the contract

and should, in fairness, be added to the amount recoverable, subject to credit being given for the deposit, if any.

See further as to the recovery of the expenses of a resale (and, in certain cases, of the original sale) the notes dealing with Condition 32 (4) above.

The Law Society's Conditions 33 and 34 deal with "Definitions and Application", but it is not thought necessary to set out these conditions here.

RIGHTS OF WAY.

Ways of Necessity.

By Robert Grundy, LL.M., Solicitor.

A way of necessity may be defined as a right of way which the law implies in favour of a grantee of land over the land of the grantor, where there is no other way by which the grantee can get to the land so granted him, or, conversely, a right of way over the land of the grantee where the land retained by the grantor is otherwise inaccessible. A grant of a way of necessity is presumed to have been made whenever land has been sold which is inaccessible except by passing over the adjoining land of the grantor, or, alternatively, by committing a trespass upon the land of a stranger, or when an owner of land sells a portion and reserves for himself a part which is inaccessible, or which, to use a popular and appropriate expression, is "land-locked".

This species of right has been recognised from very early times and owes its recognition to the well-founded principle of law that when a grant of land is made, every right is presumed to have been granted which is reasonably required for the full enjoyment of the premises, and without which the subject of the grant would be useless (*Wheeldon* v. *Burrows* (1879), 12 Ch. D. 31). So where a grant is made of "land-locked" land, it is the grantor who must be presumed to give the grantee a right of way over the land which the grantor retains; but, on the other hand, if the grantor, in selling a portion of his own land, retains a certain part which is "land-locked", it is then not he, but the grantee of the land who must be presumed to grant the way.

It is indeed difficult to see why the grantor, who does not expressly reserve for himself a way over the portion granted, should thereafter become entitled to a way of necessity under an implied grant, since a person who sells land and reserves a house adjoining that land does not thereby become entitled, by implication of law, to a right to light for windows overlooking the land, unless he expressly reserves such an easement in the deed of conveyance (*Ray* v. *Hazeldine*, [1904] 2 Ch. 17), and it can be argued that this should also apply by analogy to a right of way.

The fact that ways of necessity in favour of a grantor appear to be contrary to this fundamental principle that a man cannot derogate from his grant, may perhaps be that such rights are impliedly given by the law on the ground of public policy so that the land may not be rendered useless and unprofitable; but

whatever may be the principle upon which the right is presumed to have been granted, the law has always annexed a right of way to the ownership of land-locked ground when that and the surrounding land have been severed by sale, because of the necessity the owner has for it (*Gayford* v. *Moffatt* (1868), 4 Ch. App. 133).

A way of necessity can only be acquired in cases where a landowner has no other means whatsoever of reaching his land. If there be any other means of access to the land so granted, no matter how inconvenient, no way of necessity can arise, the mere inconvenience of an alternative way not being sufficient of itself to give rise to a way of necessity by implication. It has, however, often been thought that a way of necessity could be claimed if a person had none but an inconvenient way to his land, and this view has been supported by a *dictum* of Mansfield, C.J., in *Morris* v. *Edginton* (1810), 3 Taunt., at p. 31. That learned Judge said: "I say nothing of what is a way of necessity; I know not how it has been expounded, but it would not be a great stretch to call that a necessary way, without which the most convenient and reasonable mode of enjoying the premises could not be had"; but the balance of authority shows that no person can acquire a way of necessity if he has any other means of access to his land, however inconvenient it may be, than by passing over his neighbour's soil (*Procter* v. *Hodgson* (1855), 10 Exch. 824; *Brown* v. *Alabaster* (1887), 37 Ch. D. 490).

In order that a way of necessity may arise, it is not necessary that the land granted should be completely surrounded by the land of the grantor; it is sufficient if the land be partly surrounded by the land of strangers and abuts upon the land of the grantor (*Serff* v. *Acton Local Board* (1886), 31 Ch. D. 679).

It is not in every case in which property is useless without a right of way that the law provides the owner with a way of necessity, for such a right must arise under an implied grant; if, therefore, such a grant cannot be presumed, no way of necessity can be claimed, even though a landowner is, in consequence, wholly deprived of all means of access to his land. It has already been pointed out that a grant of this kind is generally presumed when property in land has been severed by sale, and one portion is consequently rendered inaccessible except by passing over the other, or by trespassing on the land of a stranger. It is obvious that no grant of a right of way over the land of a stranger can be presumed, and therefore no way of necessity over that land can possibly be acquired; but, on the other hand, a grant by the owner of one of the severed portions to the owner of the other

can be presumed, and therefore a way of necessity over his soil can be claimed. In the case of *Bullard* v. *Harrison* (1815), 4 M. & S. 387, Lord Ellenborough, C.J., complained of the pleadings in the action because the plea, he said, "seems to suppose that whenever a man has not another way, he has a right to go over his neighbour's close. But," he added, "that is not so"; and that a way of necessity is a thing founded in grant. It was for this reason that it was held in *Procter* v. *Hodgson* (*supra*) that no way of necessity could arise where the dominant and servient tenements had respectively escheated back into the hands of two several persons upon the death without heirs of the common owner. For this same reason also, a landowner cannot be permitted to create a way of necessity over his neighbour's soil by any act of his own, as, *e.g.*, by erecting a house to which he has no means of access except by crossing his neighbour's land, unless, perhaps, the neighbour sold him the site of the house for the express purpose that the house should be built (*Davies* v. *Sear* (1869), 7 Eq. 427).

Just as the nature and extent of rights of way created by express grant are measured by reference to the terms of the instrument creating it, and the purposes for which it is intended to be or is actually used at the time of the grant, so also the nature and extent of a right of way of necessity should be made to depend entirely on the nature of the necessity as that necessity existed at the time when the right must be presumed to have been granted; *i.e.*, when the unity of ownership of the dominant and servient tenements was severed.

This question as to whether the extent and mode of user of the right was limited by the necessity as it existed at the time of the grant, or whether it might be varied or increased from time to time if the condition of the dominant tenement were changed, was raised in the case of *The Corporation of London* v. *Riggs* (1880), 13 Ch. D. 298. The defendant in this case was the owner of certain land which he sold to the plaintiff corporation, retaining two acres which were land-locked and used for agricultural purposes. On his subsequently proposing to build a house of public entertainment on the two acres which he had retained, the corporation contended that he was not entitled to use the way for conveying building materials to erect the building, and that he could not be entitled to use the way for approach to the building when completed. Jessel, M.R., expressed considerable doubt and great reluctance in deciding the case, as there was no authority to guide him, but consoled himself with the view that the case would be taken to the Court of Appeal. The case, however, did not go

beyond his own Court. On principle, the learned Judge decided that the right must be measured by the necessity existing when the right came into being, and that it did not extend to the altered condition of the property. Owing to the hesitation of the learned Judge and the wish he expressed that the case might be taken to the Court of Appeal, it is perhaps possible that the decision may, in the uncertain future, be considered as one of doubtful authority. Indeed, it is thought that although the decision was right in this particular case, the true principle is that the extent of the right must in each case depend on the surrounding circumstances, from which the intention of the parties at the time the right was created must be presumed or inferred, and that all cases are not to be decided the same way. It is not difficult to imagine many cases in which it would be manifestly unjust to limit the right of way in the manner in which it was limited in *The Corporation of London* v. *Riggs*. In that particular case the surrounding land was granted to the corporation in order that it might be kept open as a part of Epping Forest for the recreation of the public, and it was obviously inconsistent with that purpose that the two acres in the centre, which the grantor had reserved for himself, should be covered with buildings which must inevitably have spoilt the scenery, and consequently defeated, if not wholly then in part, the very purpose for which the surrounding land was purchased by the corporation. It is true that in the case in question the intention of the owner was then only to build one house, but if the grant was to be regarded as including a right of way to one house if built, it could not be limited to that, and must have been construed as extending to any number of houses that the vendor might choose to erect on the portion of the land retained. The learned Judge said (at p. 807) that he did not think that a construction of a way of necessity as being a way for all purposes, and not as being one limited to the nature of the necessity at the time of the severance of the property, was a fair meaning of a way of necessity, and went on to say: "I think it must be limited by the necessity at the time of the grant, and that the man who does not take the pains to secure an actual grant of a right of way for all purposes is not entitled to be put in a better position than to be able to enjoy that which he had at the time the grant was made. I am not aware of any other principle on which this case can be decided." So, in *Serff* v. *Acton Local Board* (1886), 31 Ch. D. 679, a way of necessity arising upon the grant of land to a local authority to be used as a sewage works was held to be a way for all necessary purposes in connection with the sewage works. Similarly, if a way of necessity arises upon a

demise of property and the lease contemplates the carrying on of a particular business, the way of necessity is confined to a way suitable for the ordinary management of that business (*Gayford* v. *Moffatt* (1868), 4 Ch. App. 133). In short, a way of necessity exists only in connection with the purpose or purposes for which the land is granted, and cannot be enlarged or extended to cover ulterior purposes not within the scope of the grant, which would then amount to a purely colourable use of the way and an abuse of the right.

It is a firmly established principle that no person can have two or more ways of necessity over land; *i.e.*, a purchaser of land can never become entitled to more than one way of necessity to and from the land he has purchased, nor can a vendor become entitled to more than one such way to and from the portion of the land which he has retained. Nor can the person (whether vendor or purchaser), in whose favour such a presumption arises, insist as of right to have the way which is most convenient for himself, since a way of necessity does not necessarily mean the most convenient way that could possibly exist (*Pheysey* v. *Vicary* (1847), 16 M. & W., *per* Alderson, B., at p. 495).

In cases where a way of necessity arises, and there is more than one way to the property in question, it is the person who creates it, or who must be presumed to create it, who is entitled to choose the actual part of the servient tenement over which the way is to be used, but the way so selected by him must be convenient for the grantee of it. So that although the grantee has no right to insist that he shall have the way most convenient to himself, it is nevertheless incumbent upon the grantor of the right to specify a way which does not afford the grantee of it any unnecessary inconvenience (*Bolton* v. *Bolton* (1879), 11 Ch. 968). Indeed, it seems only logical and reasonable that the direction of a way should be selected by the grantor of the way, since the donor of anything given is the usual and proper person to select the article given.

It would seem that a way of necessity, once set out, cannot afterwards be altered or varied in direction by the servient owner, except, it may be presumed, with the consent of the dominant owner (*Pearson* v. *Spencer* (1861), 1 B. & S. 571). This, apart from all authority, is logically sound.

In no case can a way of necessity arise unless the necessity existed at the time of the grant of the dominant tenement; if it did not, then no subsequent circumstances will be able to justify the creation of a way of necessity (*Midland Ry.* v. *Miles* (1886), 33 Ch. D. 632).

Ways of necessity are co-extensive with the necessity, and continue for so long as the necessity lasts; *i.e.*, they are conditional on the subsistence or continuance of the necessity. If, therefore, the necessity comes to an end, the right of way also comes to an end. This point was amplified and the law clearly laid down in *Holmes* v. *Goring* (1824), 2 Bing. 76, in which the defendant was owner of two plots of land, between which lay two other plots belonging to the plaintiff over which the defendant enjoyed a way of necessity from one of his plots to the other, as the latter was otherwise without means of approach. Subsequently the defendant became possessed of another piece of land adjoining, over which he might have passed instead of using the old way over the land of the plaintiff. The question at issue was whether the right of way came to an end when the defendant acquired the possibility of getting to his own ground without using the road over his neighbour's soil, and it was held that it did, for the right was to be regarded as having terminated with the necessity. In the course of his judgment, Best, C.J., said: "If I have four fields, and grant away two of them over which I have been accustomed to pass, the law will presume I reserve a right of way to those which I retain; but what right? The same as existed before? No, the old right is extinguished, and the new way arises out of the necessity of the thing. . . . A way of necessity, when the nature of it is considered, will be found to be nothing else but a way by grant; but a grant of no more than the circumstances which raise the implication of necessity require should pass. . . . A grant therefore arising out of the implication of necessity cannot be carried farther than the necessity of the case requires, and this principle consists with all the cases which have been decided."

In the later case of *Procter* v. *Hodgson* (1855), 10 Exch. 824, however, Barons Parke and Alderson expressed the opinion that the decision in *Holmes* v. *Goring* (*supra*) was probably wrong. Parke, B., observed (at p. 828): "The extent of the authority of *Holmes* v. *Goring* is that, admitting a grant in general terms, it may be construed to be a grant of a right of way as from time to time may be necessary; I should have thought it meant as much a grant for ever as if expressly inserted in a deed, and it struck me at that time that the Court was wrong; but that is not the question now." But this expression of opinion, coming even from the reputable Baron, cannot, at the moment at any rate, be taken to overrule the case of *Holmes* v. *Goring* and the principles of law established in that case.

POWERS OF LAND ACQUISITION UNDER THE HOUSING ACT, 1936, AND THE EFFECT OF THEIR EXERCISE ON RESTRICTIVE COVENANTS.

By T. H. Band, LL.B., Solicitor.

The Housing Act, 1936, is the charter for a very great deal of activity on the part of local authorities and more land is purchased under this Act to-day than for any other single purpose of local government. The details of the 191 sections and twelve schedules are the concern of those who advise local authorities, but the powers to acquire property which the Act confers are used so extensively now that they have come to be of general professional interest. It is the object of this article to analyse the six distinct powers which the Act gives and to discuss the effect of their exercise on restrictive covenants to which the land acquired may be subject.

1. If a local authority are satisfied that a house of the working class type is in any respect unfit for habitation, but believe that the house can be rendered fit at a reasonable expense, the authority must serve a schedule of dilapidations upon the owner against which an appeal lies to the county court in whose district the house is situated (sections 9 and 15). If the Court finds that the house cannot be rendered fit for habitation at a reasonable expense, the local authority may proceed to purchase the house either by agreement or by a compulsory purchase order confirmed by the Minister of Health. If a compulsory purchase order is made, the Minister cannot confirm it if the owner undertakes to carry out the works which were required by the notice (against which he has successfully appealed); but if the order is confirmed the local authority must carry out the works forthwith after the purchase is completed (section 16). On a purchase by agreement under this section, the local authority need not carry out the works previously required of the owner.

2. When a local authority are satisfied that a defined area within their jurisdiction is, to put it briefly, a " slum ", they are to declare it a clearance area and may secure the demolition of the buildings in it either by a clearance order, which effects no change in the ownership of the properties concerned, or by purchasing the land and themselves demolishing the buildings. If the

purchase is decided upon the authority may extend their acquisition to land surrounded by the area or adjoining it if the further acquisition is reasonably necessary for convenient dimensions or satisfactory development (section 27).

3. Where the machinery of a clearance order is used to clear a slum, the resulting vacant site may be subjected in the hands of the owner to restrictions of user and development by the authority. Moreover, the vacant land may subsequently be acquired by the authority provided only that the land is not actually in process of development by the owner in accordance with plans approved by the authority and any restrictions which have been imposed (section 32).

4. If certain conditions (*vide* section 34) are found in an area of fifty or more working-class houses and the local authority are satisfied that it is expedient for the area to be redeveloped as a whole, it becomes the duty of the authority to define the area on a map and declare it a redevelopment area. A plan showing how it is intended that the area should be laid out has to be approved by the Minister and then, again with the approval of the Minister, the local authority may purchase the land in the area or land outside it which they require to provide rehousing accommodation for persons occupying the premises acquired inside the area (section 36). It is exceptional to find the approval of the Minister necessary for a purchase by agreement under the Housing Act.

5. The powers of purchase arising on the declaration of an improvement area are only of importance where an area was declared prior to August 2, 1935. As from that date, the enabling section of the Housing Act, 1930, has been repealed.

6. Very wide powers are given to local authorities by sections 73 and 74 to acquire land for the provision of houses for the working-classes and the powers may be exercised without regard either to the sanitary condition of the property acquired or to the character of the neighbourhood in which it is situated. Section 142, however, requires local authorities to have regard to the beauty of the countryside and to local amenities throughout the administration of the Act.

In the exercise of all these powers, the local authority can proceed either by agreement with the owner of the land in question or with the help of a compulsory purchase order made by them and confirmed by the Minister of Health in accordance with the First Schedule to the Act. The choice of method is within the discretion of the authority and will depend upon the number of interests to be acquired and the amenability of the owners. The Act, therefore, presents two standard methods of procedure between

which the authority choose as is convenient, but the choice is far from a matter of indifference to a person who claims the benefit of a restrictive covenant over the land affected.

The fate of restrictive covenants affecting the land acquired is reasonably clear when a compulsory purchase order is made, for the First Schedule to the Act provides that every such order shall incorporate the Lands Clauses Consolidation Act, 1845. This Act does not deal specifically with restrictive covenants, for *Tulk* v. *Moxhay* was not decided until 1848 and Challis was still able to speak of the "dubious grounds of equity" upon which their validity rested when he published his second edition in 1892, but there is sufficient authority for the following propositions:—

(1) The covenantor is discharged from his covenant on the exercise of statutory powers by which he is compelled to convey his land for a purpose inconsistent with the terms of the covenant if the compulsory sale could not have been contemplated and provided for by the parties to the covenant: *Baily* v. *De Crespigny* (1869), L. R. 4 Q. B. 180; *Walton Harvey, Ltd.* v. *Walker and Homfrays, Ltd.*, [1931] 1 Ch. 274.

(2) The authority acquiring the land cannot be prevented by injunction from developing the land for the statutory purposes for which it was purchased because the development amounts to a breach of a valid restrictive covenant: *Clark* v. *School Board for London* (1874), L. R. 9 Ch. 120; *Kirby* v. *School Board for Harrogate*, [1896] 1 Ch. 437; *Long Eaton Recreation Grounds Co.* v. *Midland Railway*, [1902] 2 K. B. 574. The only right of a covenantee where a compulsory purchase order has been made is to claim compensation for injurious affection under section 68 of the Lands Clauses Act.

The position is more obscure when the land is purchased by agreement. The local authority would probably hesitate to make use of section 84 of the Law of Property Act (unless the restrictive covenant were obsolete or could be deemed waived) because the arbitrator has to be satisfied that the public purposes impeded by the existence of the covenant are reasonable and also that no practical benefits are secured to other persons by the continued existence of the covenant. The first condition seems to substitute the judgment of the arbitrator for that of the authority, which is contrary to principle, and the second condition might easily not be satisfied.

There is one section in the Housing Act which deals expressly with third party rights in land. Section 46 (3) provides that upon completion of the purchase of any land under Part III of the Act, all private rights of way, rights of laying apparatus and all

other rights or easements over it shall be extinguished and any person suffering loss by the extinguishment shall have a right to compensation. The section has been held to include inchoate easements and so a period of prescription before the acquisition cannot be added to a period after the acquisition (*Barlow* v. *Ross* (1890), 24 Q. B. D. 381), but it is at any rate arguable whether it extends to restrictive covenants. A restrictive covenant is strictly not a right *ejusdem generis* with a private right of way or an easement, but as the difference between a registered post-1925 covenant and an easement is more formal than substantial, and as the recent tendency of the Courts is not to favour a narrow legalistic interpretation of the housing legislation, it is thought that restrictive covenants are extinguished by this section. The section, however, only applies to clearance areas, improvement areas and to redevelopment areas where the land purchased is not used for rehousing. Case (1), *supra*, is within Part II of the Act and Case (6) is within Part V. If land in a redevelopment area is used to provide housing accommodation, it is deemed to have been acquired under Part V of the Act.

The effect of a purchase by agreement under Part V on restrictive covenants is made a somewhat dark question by the use of referential legislation. Section 104 provides that where a local authority in the administrative county of London purchase land by agreement for the provision of accommodation for the working classes, the authorising section of that part of the Act (section 74) is to have effect as though the purposes of the acquisition were purposes of the Public Health Act, 1875. As the sections of the Public Health Act relating to the purchase of land by agreement (*viz.*, sections 175 and 176) incorporate the Lands Clauses Act, the result is the same as it is when a compulsory purchase order is made under the Housing Act, (*vide Kirby* v. *School Board for Harrogate*, *supra*). No similar provision in favour of housing authorities outside London is made by the Act, and as section 104 does not refer to land acquired under Part V but to land acquired under section 74, land in a redevelopment area used for the provision of dwellings is not within its scope.

The final summary seems to be that if a local authority proceeds under the Housing Act by way of compulsory purchase order, restrictive covenants are extinguished automatically and a right to compensation substituted for them. If the purchase is by agreement under the Act, the fate of the covenant depends upon the purpose of the acquisition, as follows:—

(a) If the purchase is under Part III the covenants are probably extinguished under section 46 (3);

(b) if the purchase is for rehousing purposes under section 74 the covenants are extinguished if the authority concerned is a London authority;

(c) if the purchase of land in a redevelopment area is made for rehousing purposes or if an unfit house is purchased under Part II or if a provincial housing authority purchases land for rehousing purposes, the restrictive covenant is unaffected. If the covenantee refuses to release his covenant and a discharge of it cannot be obtained under section 84 of the Law of Property Act, the authority who have purchased the land may be in a difficult position. The ultimate step apparently would have to be a special compulsory purchase order comprising the benefit of the restrictive covenant, which may be " a right over land " within the definition of " land " in the Housing Act and if so capable of forming the subject of an order.

It may be pointed out in conclusion that no rights to the service of notices, etc., and no power of objection to the proposed acquisition are given by the Housing Act to persons entitled to the benefit of restrictive covenants. This is in sharp contradistinction to the provisions of section 84 of the Law of Property Act.

NOTES OF RECENT CASES.

1. *CONVEYANCING AND REAL PROPERTY CASES.*

Sale of land—inaccurate plan—date of completion—rectification —damages.—Wallington v. *Townsend*, [1939] 2 All E. R. 225, arose out of an inaccurate plan attached to the contract in some rather complicated circumstances. Shortly stated, the Judge appears to have held as a matter of fact that the contract was for the sale of part of land and a divided bungalow, that the division was not in accordance with the plan in the contract, which had related to an earlier division of the property, that the vendor had not intended to sell the land in accordance with the plan, that the purchaser had intended to buy at least part of the disputed strip on the plan. The vendor claimed rectification and the purchaser claimed damages. The purchaser had failed to complete on the date fixed for completion. Morton, J., held that the description of the property in the contract was controlled by the plan, that the vendor had not proved that the parties were *ad idem* and hence she could not obtain rectification, that the date fixed for completion was in the special circumstances a time which was not of the essence of the contract, that the defect was not one of title and that the purchaser was entitled to damages, that these damages need not be proved and that they were at large and that the Court must deal with them and give such damages as, according to general principles, it thinks right (see at p. 239).

The two most important parts of the decision are the first and the last. The property was described as the piece of land situate, etc., " together with the bungalow called ' Seaspray East ' and the garage now standing thereon . . . as the same is more particularly delineated on the plan annexed hereto and thereon coloured pink ". The learned Judge held that this constituted a definite description by plan and cited the observations of Lord Wrenbury in *Eastwood* v. *Ashton*, [1915] A. C., at p. 920, where he said: " The words ' more particularly ' exclude, I conceive, that they have already been exhaustively described. These words seem to me to mean that the previous description may be insufficient for exact delimitation, and that the plan is to cover all deficiencies, if any." In view of the modern tendency to use plans to assist description of the property this case is important, if only as a warning. The

vendor's right to insist upon a plan was discussed in the note to *Re Sharman's Contract*, [1936] Ch. 755 (*ante*, Vol. I, p. 172), but if the plan is introduced by words such as those used in this case, which are very common, it seems to have the effect of modifying the rule in *Willis* v. *Watney* (1882), 51 L. J. Ch. 181, in which land passed though not coloured in the plan by reason of the verbal description. Unless, therefore, the plan has been carefully checked it should not be employed as a method of description although it has been used in previous deeds.

The question of damages raised an interesting problem. In this case there was no question of a defect in the vendor's title, since the vendor had a title to the property which should not have been included in the contract, and hence the rule in *Bain* v. *Fothergill* did not apply. The vendor had not intended to convey it but it was a breach of contract. It was argued that in the absence of any proof of damage no damages could be recovered. This view was rejected by the learned Judge. He followed the principle expressed in *Re Daniel*, [1917] 2 Ch. 405, that in such a case the purchaser could recover damages for loss of bargain but that if he did so he could not recover the conveyancing expenses. If, however, he did not recover for loss of bargain it was the view of the learned Judge that he could recover conveyancing expenses. Hence, if there was no proof of any damage the conveyancing expenses were recoverable, as these were incurred in respect of the contract of which there was a breach. The point is that the damages in such a breach are at large under the general principles of law applicable to contract. The loss incurred by the purchaser might reasonably be foreseen by the vendor who breaks the contract, because it was properly incurred by the purchaser in an endeavour to carry out the contract and so was recoverable. This seems to be carrying out the view expressed in Williams, *Vendor and Purchaser* (4th ed.), at p. 1018: "Subject to this special rule (*Bain* v. *Fothergill*), the purchaser's right appears to be regulated by the general law" (and see *op. cit.*, pp. 1021—1023, for the expenses recoverable).

Boundaries—hedges and ditches—plan.—Fisher v. *Winch*, [1939] 2 All E. R. 144 is interesting both on boundaries and plans. The defendant and plaintiff both claimed through predecessors in title who took land from the same grantor by conveyances dated on successive days. The dispute concerned the ownership of the ditch on the far side of the plaintiff's land. Both the original conveyances were made by reference to plans based on the ordnance survey map and contained measurements by acreage. In the

defendant's case the property was declared to be more particularly described in the plan, and the conveyance to the plaintiff's predecessor in title, which was the later in date, had a plan annexed for the purpose only of identity. Neither the hedge nor ditch was referred to in either case. The Court of Appeal, overruling the Judge of first instance, held that the presumption that the ditch belonged to the owner of the land on which was the hedge could be rebutted by contrary evidence, that the evidence was that under ordnance survey the line was taken to the centre of the hedge, and hence the ditch belonged to the defendant. It is interesting to note that the learned Master of the Rolls said that the evidence of a local solicitor, which was really evidence as to the way in which conveyances in a country district ought to be construed, was entirely inadmissible.

It is thought that the case does not lay down any new law (see *Collis* v. *Amphlett*, [1918] 1 Ch. 232; (1919), 89 L. J. Ch. 101), but it definitely accepts as the principle of construction of ordnance maps that the boundary is the centre line of the hedge. Hence the use of ordnance survey maps for the sale of land that is not, as in the case noted, only part of the grantor's land presents danger (see *Key and Elphinstone* (13th ed.), Vol. I, p. 322) unless it is used by way of identification only : see *Re Lindsay*, 72 L. T. 832.

It is convenient to remark that in registered land the plan is often derived from the Ordnance Survey, but by the Land Registration Rules, 276—278, the boundaries are general boundaries unless a contrary note is added to the Register. It is thought, however, that where the first registration is based on an application by reference to the ordnance survey map the principle laid down in the case noted should be followed, since the plan here normally provides the basis of description : note here the statement of Morton, J., in *Wallington* v. *Townsend* noted *supra*.

In the case noted it will be observed that it was the earlier conveyance in which the plan was declared to be by way of description. As the earlier conveyance was made to the defendant he obtained a boundary to the middle of the hedge, and the later conveyance could not have conveyed both hedge and ditch to the plaintiff by reason of the plan being by way of identity only. At the most an action could lie for breach of the covenants for title, if any. This point did not of course arise in the instant case since the original grantor was not a party. Had the conveyance under which the plaintiff claimed been of earlier date the position would have been reversed and whatever was claimed by the defendant under his conveyance would not have been relevant : cf. *per*

Greene, M.R., at p. 146. It is submitted that in this case there might be an opportunity, despite the use of the ordnance survey map, to give evidence concerning the presumption that the ditch belongs to the land on which the hedge is placed. Observe in this connection that Goddard, L.J., said (at p. 148): "This matter of the respective position of the fence and the ditch as affording evidence of the boundary was referred to both in the defence and throughout the trial—which I think possibly explains some of the confusion that arose—as a custom. It is not a custom at all, when rightly understood. It is a mere presumption. It is a very different thing from a custom. There is a presumption which is in use, and it is very often decisive where there is no evidence at all as to what the boundaries are, but, like any other presumption, it is rebuttable, and very often it can easily be rebutted by the production of title deeds."

The point of the distinction just made is that a custom, not inconsistent with the express terms of the deed, controls its effect even by superadding terms to those already expressly mentioned: see *Wigglesworth* v. *Dallison* and notes thereto, 1 Sm. L. C. (13th ed.), p. 597.

Joint tenancy — statutory trust for sale. — Re Buchanan-Wollaston (noted *ante*, p. 328) has now been affirmed by the Court of Appeal: [1939] 2 All E. R. 302. The Court of Appeal refused to order a surviving joint tenant holding on the statutory trust for sale to concur in a sale of land which had by agreement between the trustees been subjected to certain conditions of which one was that the land should only be sold with the consent of all of them. The joint tenants in this case were beneficially entitled in undivided shares by reason of the fact that the purchase money had been provided in unequal shares, but the Court of Appeal acted upon the assumption that the provisions applicable were those of section 36 of the Law of Property Act, 1925, and not section 34 of that Act. No report has yet given the exact words of the habendum so far as we are aware, but it is suggested that this is a relevant consideration. It is admitted that on the point actually decided it does not seem material whether the statutory trust for sale arose by virtue of section 34 or section 36, but it is of considerable importance to know the circumstances in which section 36 will apply where the legal owners are entitled in undivided shares. Section 36 only applies where the land is not settled land, but there is no similar exclusion in section 34. This alone should be sufficient to render the point of importance, but the whole

language of section 36 is different. The point has, however, been discussed in our earlier note and does not call for further comment in the absence of further authority.

The refusal of the Court to order the trustee to concur in the sale must be based upon the equitable doctrine that he who seeks equity must do equity. The basis of the decision lay in the fact that the application to the Court was made by one who had already agreed that no sale should take place without the consent of all. The learned Master of the Rolls declined to consider the general effect of the statutory trust for sale in overriding or nullifying any provisions in the instrument. He said (at p. 308): "If and when that particular question comes to be considered again, it may require some full examination, but what I am saying now is not affected by the decision in that case [*Re Flint*, [1927] 1 Ch. 570], because it seems to me that the Court of equity, when asked to enforce the trust for sale, whether one created by a settlement or a will or one created by the statute, must look into all the circumstances of the case and consider whether or not, at the particular moment and in the particular circumstances when the application is made to it, it is right and proper that such an order shall be made." It is to be noted that here the learned Judge is addressing his mind to the problem whether a trust for sale should be enforced by the Court. The aspect of the problem which appeared in cases such as *Re Flint* (*supra*) and *Re Thomas*, [1930] 1 Ch. 194, was the inconsistency of powers or rights created by the instrument. These are separate facets of the problem, and it is thought that nothing in the judgment reflects upon the accuracy of these decisions. The true position of the statutory trust for sale requires very careful watching as the line of authority develops.

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2. *WILL CASES.*

By S. J. BAILEY, Barrister-at-Law.

Administration—hotchpot clause—interest on advances.—In *Re Wills, Dulverton* v. *Macleod*, [1939] 2 All E. R. 775, the testator directed that his residuary estate be held upon trust for all his children in equal shares (except that each son should take three times as much as each daughter) on attaining twenty-five years, or, being female, on earlier marriage; and the share of each daughter was settled. There was also a hotchpot clause to the effect that all gifts (exceeding £500 in value) made by the testator prior to his death to or for the benefit of any child should be taken in or towards satisfaction of the share of the said child,

failing any written direction by the testator to the contrary. The estate consisted almost entirely of securities quoted on the principal stock exchanges, and was very large. The testator had made *inter vivos* settlements of varying amounts on each of his children. In order to ascertain how they should divide among the children income produced by the residuary estate, the trustees sought directions as to what interest, if any, on the sums advanced by the testator should be brought into hotchpot against each child. Simonds, J., decided that each child should be charged with interest on his advance at 4 per cent. from the death of the testator, the amount of the advance being determined by its value at the date it was made. He thus applied the old-established rule that interest should be charged on advances from the time of distribution to the time of actual distribution—*i.e.*, during the period in which distribution is delayed.

In *Re Hargreaves* (1903), 88 L. T. 100, the Court of Appeal had adopted a different method: the various advances were added to the net value of the residue at the date of the testator's death; the children's due proportions of the residue were thus ascertained at once; and the income actually received from the residue was divided among the children in those proportions. This method avoided calculations as to interest. But subsequent decisions have usually found some reason for distinguishing *Re Hargreaves*—*e.g.*, because it is difficult to make a fair and proper valuation of the residuary estate or because the language of the will suggests that the testator did not contemplate an immediate division of the estate. Simonds, J., now decides, fortified by Sargant, J.'s decision in *Re Tod*, [1916] 1 Ch. 567, that *Re Hargreaves* should be applied only where the will upon its true construction so directs. The ancient rule of administration should be adhered to, unless the testator's directions show a contrary intention. "In this, as in other matters of administration, the essential thing is to have a settled rule. . . . Nor is it less important, when once a rule has been established, not to refine upon it by exceptions and exceptions on exceptions, for thus there is created the very state of uncertainty and confusion which led in the first place to the establishment of the rule" (*per* Simonds, J., at p. 778).

Condition—public policy—inducing future separation between husband and wife.—The decision in *Re Moore* (1888), 39 Ch. D. 116, is sometimes cited as authority for the proposition that a condition which tends to induce a future separation between husband and wife is contrary to public policy, and void. It would seem that this proposition should be restricted to cases in which

the testator's apparent object in making the disposition was to induce such a separation (see Cotton, L.J., at p. 128). Accordingly, in *Re Thompson, Lloyds Bank, Ltd.* v. *George*, [1939] 1 All E. R. 681, a provision whereby the testator's daughter should receive only a small annuity so long as she should remain married to her present husband, but should receive the whole income of the estate if at any time she should be his widow or divorced from him, was held, on the facts, to be valid. Although the evidence (as in *Re Moore*) showed that the testator intensely disliked the husband, Bennett, J., was not satisfied that the testator's object was to induce a divorce or separation; on the contrary, he found that the testator's main object was to prevent the income from falling into the hands of a man whom he regarded as a spendthrift.

Construction—rule in Lassence v. *Tierney—failure of trusts imposed for the benefit inter alia of third parties.*—Lord Davey, in *Hancock* v. *Watson*, [1902] A. C. 14, 22, stated the rule in *Lassence* v. *Tierney* as follows: "It is settled law that if you find an absolute gift to a legatee in the first instance, and trusts are engrafted or imposed on that absolute interest which fail, . . . then the absolute gift takes effect so far as the trusts have failed." The rule as originally stated by Lord Cottenham in *Lassence* v. *Tierney* (1849), 1 Mac. & G. 551, 561, was limited to cases where the engrafted trusts were imposed in order to "secure certain objects for the benefit of the legatee". No such limit, however, was mentioned by Lord Davey in *Hancock* v. *Watson*. The House of Lords has now decided, in *Fyfe* v. *Irwin*, [1939] 2 All E. R. 271, that no such limit exists. The rule equally applies where the restriction imposed upon the legatee's absolute gift is wholly or in part for the benefit of third parties. Indeed, in the words of Lord Romer (at pp. 281, 282), the rule is only invoked for the purpose of reconciling inconsistent provisions in the will and to avoid recourse to the rule that the later of two such inconsistent provisions prevails over the earlier. Obviously, therefore, its justification is not dependent upon the precise nature of the engrafted trusts. The terms of the will in *Fyfe* v. *Irwin* were somewhat complicated: in substance there was a gift of the testator's residuary estate to be divided among his children equally; and this was followed by a subsequent clause which settled the share of each daughter upon trust for her for life, and subject thereto for her issue equally *per stirpes*, and, in the event of her leaving no issue surviving at her death, for such other of the testator's residuary legatees as should survive her. There were three daughters. They left no issue, and died respectively in

1934, 1935, and 1936. The last survivor was in fact paid the shares of her deceased sisters, and no question was raised as to these accrued shares. The contest was as to the ultimate destination of her original share. Clearly the trusts engrafted upon it (both for her possible issue and, in default of issue, for any other residuary legatees who might survive her) failed on her death without issue: accordingly, the rule in *Lassence* v. *Tierney* applied, and the original absolute gift to her took effect. The case was an appeal from Scotland; and the rule there is the same as in this country.

Probate — codicil — whether intended to be conditional — construction—surrounding circumstances.—Although a Court of probate is not ordinarily concerned with the construction to be placed upon the words of a testamentary document, questions of construction must sometimes be solved before that Court can decide whether a document ought to be admitted to probate and to whom administration should be granted. *In the estate of Thomas, Public Trustee* v. *Davies*, [1939] 2 All E. R. 567, concerns a holograph codicil which began by confirming a previous will; proceeded, "If I survive my wife . . . ", to leave to X any property "inherited under her will" and to appoint X as sole executrix "of this my will"; and, finally, in subsequent paragraphs, gave from the testator's own property a number of legacies and a residuary gift, and appointed Y and Z executors "of this my will". In these obscure circumstances, Langton, J., was unable to deduce an intelligible meaning either from the words themselves or from the codicil as a whole; moreover, to read the codicil with the will created additional difficulties, for, though purporting to confirm the will, the provisions of the codicil were almost entirely inconsistent with those of the will. He therefore proceeded to inquire into the extraneous surrounding circumstances (the ambiguities being as to matters "of meaning, as distinguished from intention"), and concluded in the light of these surrounding facts—chiefly the relations which existed between the testator and the various beneficiaries under his will and codicil—that the codicil was intended to be *entirely* conditional upon the testator's surviving his wife. In fact the testator predeceased his wife. Accordingly, the codicil was wholly inoperative and was not admitted to probate.

Probate—incorporation by reference—whether implied reference sufficient.—A will may incorporate by reference the contents of a document which was already in existence when the will was

signed and attested, provided that the will sufficiently identifies the document in question. *In the estate of Saxton, Barclays Bank, Ltd.* v. *Treasury Solicitor*, [1939] 2 All E. R. 418, appears to show that these requirements may be satisfied although the will contains no specific reference to any document. The will concerned merely appointed executors and stated, "I give devise and bequeath all my real and personal estate wheresoever situate among the following persons". It was duly signed and attested. The facts that the testator, having spent some three hours avowedly in writing his will, called for witnesses to attest his will, that the witnesses testified that they signed on something that seemed thicker than a single sheet of paper, and that the testator subsequently preserved in the same envelope with the will certain lists of names and sums of money headed "I wish to leave the following amounts", enabled Henn Collins, J., to hold that the lists existed when the will was signed. The words of the will "among the following persons" were held to be a sufficient reference to the existence of some such documents or lists; and the headings of the lists together with the fact that there was no evidence that any other lists of intended beneficiaries had ever existed was held sufficient to identify the lists produced as those to which the will impliedly referred. This decision appears both to carry the doctrine of incorporation by reference to somewhat extreme lengths and to provide a possible method of evading the rule that a will should be signed "at the foot or end thereof".

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3. *INCOME TAX CASES.*

By L. J. STEIN, Barrister-at-Law.

[Notes on the following decisions are held over for lack of space and will appear in a later issue of *The Conveyancer*: *Re Maclennan* (tax free annuity), [1939] 1 All E. R. 587; *C. I. R.* v. *Tring Investments* (surtax on undistributed income of investment company), Tax Leaflet 1010.]

Tax free annuity—"free of all deductions".—Re Cowlishaw, [1939] W. N. 74, is an addition to the long series of cases in which the question has arisen whether an annuity payable under a will is or is not payable free of tax. As is well known, there are two main principles to be applied in such cases. First, the question must be determined by the testator's intentions, to be ascertained, in the case of every will, as a matter of construction. Secondly, the effect of the decisions in which that primary principle has been

applied is that there are certain canons of construction, of which one is that such expressions as "clear of deductions" will not suffice to make the annuity tax free unless it appears from the context that the deductions referred to include the deductions authorised by the Income Tax Acts. In *Cowlishaw's Case* the will bequeathed an annuity "free of all duties", to be paid "free of all deductions whatsoever". Having regard to the use of the word "duties", it was held, as a matter of construction, that in this case the word "deductions" included deduction of tax, and that the annuity was, therefore, payable tax free. It is hardly necessary to add that, while an agreement not to deduct tax from an annuity or other annual payment is void by reason of Rule 23 of the All Schedules Rules of the Income Tax Act, 1918, it has long been well settled that that Rule has no application to wills.

Tax free annuities—immunity from surtax.—The decision in *Re Horlick's Trusts*, [1938] 2 All E. R. 553; 17 A. T. C. 549, discussed in *The Conveyancer* for June, 1938 (pp. 384D—384F), has now been affirmed by the Court of Appeal: 17 A. T. C. 558.

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4. *DEATH DUTY CASES.*

By L. J. Stein, Barrister-at-Law.

[Notes on the following Estate Duty decisions are held over for lack of space and will appear in a later issue of *The Conveyancer*: *L. A.* v. *Clark's Trustees*, [1939] S. L. T. 1; *Westminster Bank* v. *Att.-Gen.*, [1939] 2 All E. R. 72.]

Estate duty—aggregation—policy moneys.—In *Tennant* v. *L. A.*, [1939] 1 All E. R. 672, the deceased, having effected a policy on his life, had during his lifetime, assigned it to trustees on trust to use the proceeds for the payment of death duties and to divide any surplus among certain beneficiaries. It was not disputed that on the death of the deceased estate duty was payable in respect of the policy or its proceeds under section 2 (1) (d) of the Finance Act, 1894, but a question arose as to aggregation under section 4. It was contended on behalf of the estate that the property deemed to pass under section 2 (1) (d) was not the policy but the policy moneys, and that, since these did not come into existence until the death of the deceased, they were clearly property in which the deceased never had an interest, and which must accordingly be treated as an estate by itself by virtue of the proviso

to section 4. This contention was rejected by the House of Lords, which was unanimously of opinion that, even supposing that it was not the policy but the policy moneys on which the duty was leviable (a point which was left undecided), it could still not be said that the policy moneys were property in which the deceased never had an interest in the wide sense in which that expression must be understood in section 4. Up to the time of the assignment the deceased was free to assign or charge the proceeds of the policy in their entirety, and, indeed, even after the assignment he still had a contingent interest in the policy moneys by way of resulting trust. The decision was in line with that of Rowlatt, J., in *Att.-Gen.* v. *Pearson*, [1924] 2 K. B. 375, which was expressly approved.

THE LIBRARY.

The Practice and Law Relating to Sales and Mortgages of Reversions and of Policies of Assurance. By A. V. RISDON, Solicitor. London: Sweet & Maxwell, Ltd., and Stevens & Sons, Ltd. lv and 367 pp. (30*s.* net.)

This book is undoubtedly in many respects an able work. It is felt, however, that its form is not altogether satisfactory.

With the object of assisting persons new to this class of work the author has endeavoured to carry the practitioner through typical reversion loan or purchase cases, interpolating suitable letters and forms as the matter develops. A good deal of space is occupied by purely formal letters some of which appear to proceed on the assumption that the reader is unable to write the simplest of letters. At page 297, letter No. 60 states: "We are acting for . . . who informs us" [? that] "you have agreed to sell the above policy to him for £ . . . subject to our inquiries and investigation of title. Will you please give us the name and address of the solicitor who will act for you in this matter, *or alternatively*" [? inform us] "*if you wish us to act for you jointly with the purchaser.*" It will be seen that the second paragraph does not "read"; but it appears to be intended to contain an inquiry whether the vendor would wish the purchaser's solicitor to act for him. On page xi of the Introduction the author refers to the ethical aspect of reversion work. On the same page of the Introduction the author says: "Anything savouring of unprofessional conduct should be reported to the Law Society"; but has not Mr. Risdon lost sight of the rule against "touting" when settling letter No. 60? It is not thought that many solicitors would care to make such an inquiry having regard to Rule I of the Solicitors' Practice Rules, 1936, which states that "a solicitor shall not directly or indirectly apply for or seek instructions for professional business".

The very extensive preliminary inquiries recommended by the author

would not, it is suggested, tend to facilitate business in reversionary interests. It may be that certain firms acting for reversionary societies do make the very exacting inquiries suggested by the author but it is certainly not the general practice. No doubt the advisers of such societies appreciate that if their inquiries were as lengthy as would be necessary to comply with the suggestions of the author a great many intending borrowers or vendors would close the negotiations rather than endeavour to answer such extensive inquiries.

Whatever may be the theoretical necessity for the inquiries suggested, the fact is that, in practice, in at least ninety per cent. of the cases where trouble arises, it is due not to the omission of detailed and searching inquiries, but to some definite mistake as to the exact interest of the vendor or borrower. For example, a mistake may be made by a mere oversight when considering the particulars of the interest supplied, or a wrong view may be taken as to the construction of the trust deed or will under which the reversionary interest arises. The very technical inquiries suggested by the author would not be of any avail in such cases.

As to the request to the trustees to agree to the restriction of the investment clause (page 50), it is felt that this is hardly a matter which should be inserted as a general inquiry, but that such a question should only be raised on specific instructions from the purchaser or mortgagee, although no doubt the existence of a very wide investment clause is a proper matter for report to the intending purchaser or mortgagee.

There is a good deal of "loose statement" in the work. Thus, at page 237 the wording of Section E suggests to a person referring quickly to that section that trustees may (subject to the investment clause) invest in freehold ground rents or "nominal leaseholds" with 200 years unexpired. It seems clear from the statement in Section X on page 236 that the author does not intend to convey this impression, and the heading "Trust Mortgages" on page 237 confirms this view, but Section E alone is misleading. On page 236 the author mentions that the word "securities" *per se* means, *prima facie*, something secured, and then states that "in the Trustee Act investment covers 'everything' (section 68)". On page 186 it is stated that "four per cent. is an implied rate of interest for the purchase of a reversion". This is not a very clear statement.

As the book is professedly "practical" it is appropriate that reference should be made to the practical notes which, in the main, are good. They could, however, be improved in some cases by omissions and in others by amplification.

Amongst the notes to enable a managing clerk to complete a matter with which he is not already familiar there is a note (page 171) that a bankers' draft is to be handed over "on the understanding" that the vendor's solicitors will see to the repayment of a certain charge, but there is nothing to indicate whether the vendor's solicitors have authority from the chargee to receive the money on that understanding or whether the "understanding" is to be reduced to writing. Unless the vendor's solicitors have authority to give a receipt, and do give a receipt on behalf of the chargee for the moneys involved, it would not seem that the purchaser or lender would be in a safe position. There appears to be no suggestion that the charge duly vacated will in due course be handed over. It may be intended to imply that the charge will be handed over on completion and that the solicitors are only to be responsible for handing over the moneys to the chargee. This again raises difficult questions.

If the space devoted to correspondence were devoted to the amplification of statements of law and the insertion of references to authorities the book would probably be made more useful and accurate. Thus, one is told that intention to abandon one domicil and reside permanently or indefinitely elsewhere is necessary in connection with the acquisition of a domicil of choice. This statement is followed by the words "*e.g.*, taking a house for three years (Boldrini (1932))". It is suggested that this example is very misleading, as the taking of a tenancy for three years would be by no means conclusive.

It is not possible to feel when reading this work that it is the result of mature judgment and the numerous trite remarks in the book could be omitted with advantage.

It would not be fair to conclude this review without saying that subject to the blemishes above recorded this book contains a great deal of useful matter, and there are many practical notes in the book which would be valuable not only to persons embarking on reversion work but also to persons having a substantial practice in such work.

The index is good and comprehensive. The practice of inserting in the text only the year in which cases were decided and omitting the reference to the reports will not, however, be approved by all.

E. O. Walford.

Hood & Challis's Property, Settled Land, Trustee and Administration Acts. Eighth edition. By J. H. Boraston, M.A., B.C.L., of the Inner Temple and Lincoln's Inn, Barrister-at-Law. London: Stevens & Sons, Ltd. 1938. cxxxi and 980 pp. (Price £1 10*s.* net.)

This is a single volume commentary on the Property Legislation of 1925 (excluding the Land Registration Act) at a singularly low price. The commentary incorporates the very valuable notes in the *Hood & Challis's Conveyancing Statutes* which justly rendered that book a standard commentary on the old Conveyancing, Settled Land and Trustee Acts, many of the provisions of those Acts being re-enacted in the 1925 legislation. The other relevant statutory provisions also are included, such as the Land Charges Act, the Law of Property Act, 1922, and other enactments, such as the Conveyancing Act, 1881, s. 30, which still have importance in the property law.

Following the precedent of earlier editions the notes tend to be brief, but are very much to the point. So far as we have been able to test it no case has been omitted from the notes of the relevant sections, and the commentary clearly shows what is, or was in 1925, new law and the relation between relevant sections. The index is full. An adequate index is of the first importance and it is significant that this index runs to 120 pages. As a guide to the decisions and interpretation of the new law the practitioner can, it is thought, rely upon this commentary. On many questions of older law the practitioner should be glad to avail himself of an up-to-date edition of the very valuable notes of the old *Hood & Challis*, containing, as many of them did, points of learning not readily accessible in the ordinary books.

PRECEDENTS

EDITOR'S NOTE.

Readers from time to time send to the Editor suggestions for forms which they consider would be useful. These suggestions are always most welcome. They are helpful in adding to the variety of the Precedents and as showing what our readers want. If such suggestions are not immediately adopted it is not because they are not appreciated; it is rather that in some cases a form has already been published of a similar character or because the space allotted to Precedents in the next number is already completed.

Latterly the Editor has been receiving a number of requests for additional forms of assents to meet particular cases. For instance, a reader has recently suggested a form of assent where, on an intestacy, land is appropriated in satisfaction of the £1,000 which a surviving spouse takes under the Administration of Estates Act, 1925.

The Editor has not and is not proposing to add to the forms of assent which have been printed here. He is clear that it is wisest to employ the standard forms of assent without recital of beneficial interests. There appears to be no advantage in explaining in an assent why it is made. The decision of Bennett, J., in *Duce and Boots Cash Chemist (Southern), Ltd.'s Conveyance*, [1937] Ch. 642, shows the dangers of bringing equitable interests on to the legal title by recitals in assents. These suggestions for assents are therefore on principle not being adopted, but the Editor will welcome other suggestions and forms.

Form 1.

Lease for a Long Term applicable to either a Lower or Upper Maisonette, each Maisonette having Part of Garden and Right of Way over Paths used jointly by Tenants of both Maisonettes. Cost of Insurance to be Paid to Landlord as an Additional Rent (*a*).

Drafted by the General Editor.

THIS LEASE made the —— day of —— 19— BETWEEN —— Limited whose registered office is situate at —— (hereinafter called "the Lessor") which expression where the context so admits includes the estate owner or estate owners for the time being of the reversion of the premises hereby demised expectant on the term hereby granted of the one part and —— (hereinafter called "the Lessee" which expression where the context so admits includes the executors administrators and assigns) of the other part.

Now in consideration of the sum of —— now paid by the Lessee to the Lessor (the receipt whereof the Lessor doth hereby acknowledge) and also in consideration of the rents covenants and conditions hereinafter reserved and contained on the part of the Lessee to be paid observed and performed THIS DEED WITNESSETH as follows:—

1. THE Lessor doth hereby demise unto the Lessee

Parcels for lower maisonette only.

ALL THAT piece or parcel of ground situate and being on the —— side of a road known as —— in the county of —— and

(*a*) Stamp *ad valorem* on rent. This form was drafted for use where on a building estate most of the houses were to be maisonettes. The object of making the lease applicable to both an upper and lower maisonette was so that the lessee should know on what conditions other than rent the other lessee held the other maisonette. Each maisonette had a part of the garden and the paths to be used jointly, *e.g.*, the path to the door of each maisonette and through part of the garden belonging to one maisonette to the garden of the other maisonette were reserved to the landlord and only a right of way is given over them to each lessee, but each lessee has to pay his share of upkeep; it was considered that if one lessee was granted a path with a right of user reserved to the other lessee there would be constant trouble, whereas if each had equal rights with an appeal to the landlord one cause of friction would be removed.

which is more particularly delineated and shown on the plan hereto and thereon coloured pink hatched black and pink AND ALSO ALL THAT maisonette known or intended to be known as —— aforesaid being the ground floor or lower maisonette of the building now standing upon the said piece of land and on the said plan coloured pink hatched black AND ALSO ALL THAT coal store on the said plan marked black

Parcels for upper maisonette only.

ALL THAT upper maisonette situate and being on the —— side of a road known as —— in the county of —— which upper maisonette is more particularly delineated and shown on the plan hereto and thereon coloured pink hatched black AND ALSO ALL THAT piece or parcel of land shown on the said plan and thereon coloured pink AND ALSO ALL THAT coal store on the said plan marked black situate under the stairway leading to the said maisonette

TOGETHER with the rights privileges and appurtenances mentioned or referred to in the First Schedule hereto

EXCEPT AND RESERVING to the Lessor the rights and benefits mentioned or referred to in the Second Schedule hereto

TO HOLD the demised premises unto the Lessee from the —— day of —— 19— for the term of nine hundred and ninety-nine years

YIELDING AND PAYING therefor yearly during the said term the rent of —— without any deduction except for landlord's property tax by equal quarterly payments on the —— day of —— the —— day of —— the —— day of —— and on the —— day of —— in every year the first of such payments or a proportionate part thereof to be made on the —— day of —— next AND ALSO PAYING by way of further and additional rent from time to time a sum or sums of money equal to one-half of the amount which the Lessor may expend in effecting the insurance on the premises comprising together the (*b*) —— maisonette hereinbefore assigned and the other maisonette part of such premises against loss or damage by fire accident or damage by enemy aircraft or otherwise as hereinafter mentioned such last-mentioned rent to be paid without any deduction on

Further rent half insurance premiums.

(*b*) Add lower or upper as case may be.

the quarter day for payment of the rent next ensuing after the expenditure thereof

But subject to the restrictions and reservations more particularly mentioned and referred to in the Third Schedule hereto.

Party wall between adjoining premises.

2. It is hereby agreed and declared between the Lessor and the Lessee that the —— wall of the maisonette building hereby demised shall be deemed to be a party wall to be maintained and repaired at the joint expenses of the Lessee and the tenants occupiers or owners for the time being of the adjoining property thereby separated.

Lessee's covenants:

3. The Lessee hereby covenants with the Lessor in the manner following that is to say:—

(1) To pay the rents hereby reserved at the time and in manner aforesaid without any deduction except as aforesaid.

to pay rates and taxes;

(2) To pay and discharge all rates taxes duties assessments charges and outgoings whatsoever whether parliamentary parochial or of any other description which now are or during the term hereby granted shall be imposed or charged on the demised premises or the Lessor or the Lessee or occupier in respect thereof except the landlord's property tax.

(3) From time to time during the said term to pay all costs charges and expenses incurred by the Lessor in abating a nuisance and executing all such works as may be necessary for abating a nuisance in obedience to a notice served by a local authority.

external painting every three years;

(4) In the year 19— and thereafter once in every third year of the said term and also during the last year thereof to paint at a time to be appointed by the surveyor for the time being of the Lessor and in a like colour as the premises are at present painted or in such other colour as such surveyor as aforesaid may direct all the outside wood and iron work of the demised premises and all additions thereto with two coats of good oil and white lead paint in a proper and workmanlike manner.

(5) Once in every seventh year of the said term and also during the last year thereof to paint all the interior of the demised premises and all additions thereto usual or proper to be painted with two coats at least of good oil and white lead paint in a proper and workmanlike manner And also at such times as last aforesaid to grain varnish whitewash colour and paper such parts of the interior of the demised premises as are usually so treated. internal decorating every seven years;

(6) From time to time and at all times during the said term well and substantially to repair uphold support cleanse maintain drain amend and keep the premises hereby demised [and in particular the joists or other the support for the floor of the upper maisonette (*c*)] [and in particular to keep the floors and roof in good weatherproof condition and free from all leakage of rain water or other elements or things which may in any way damage or affect the lower maisonette (*d*)] and all new buildings which may at any time during the said term be erected on and all additions made to the demised premises and the fixtures therein and all party and other walls and fences hedges (if any) sewers drains pathways passage-ways easements and appurtenances thereof with all necessary reparations cleansings and amendments whatsoever. to keep in repair;

(7) At all times during the said term to pay and contribute a rateable or due proportion of the expenses of making repairing maintaining painting supporting rebuilding and cleansing all ways passageways pathways sewers drain pipes watercourses water pipes cisterns gutters party walls party structures and gates fences hedges (if any) easements and appurtenances belonging to or used or capable of being used by the Lessee in common with the Lessor or the tenants or occupiers of the premises near to or adjoining the demised premises or of which the demised premises form a part such proportion in the case of difference to be settled by the surveyor for the time being of the Lessor to pay share of repairs, etc.;

(*c*) Delete for upper maisonette.
(*d*) Delete for lower maisonette.

whose decision shall be binding And to keep the Lessor indemnified against all costs and expenses aforesaid.

(8) All the demised premises painted repaired upheld cleansed maintained drained amended and kept as aforesaid at the expiration or sooner determination of the said term quietly to yield up unto the Lessor together with additions and improvements made thereto in the meantime and all fixtures of every kind in or upon the demised premises and which during the said term may be affixed or fastened to or upon the same except tenants' fixtures.

to permit landlord to enter.

(9) To permit the Lessor or its agents at all reasonable times during the said term with or without workmen or others to enter the demised premises and examine the state of repair and condition thereof and during the last seven years of the said term take schedules or inventories of the fixtures and other things to be yielded up at the expiration of the said term And also to repair and make good all defects and wants of reparation which shall be discovered on any such examination and of which notice in writing shall be given by the Lessor to the Lessee within one calendar month after the giving of such notice.

(10) If the Lessee shall make default in any of the covenants hereinbefore contained for or relating to the repair of the demised premises it shall be lawful for the Lessor (but without prejudice to the right of re-entry under the clause hereinafter contained) to enter upon the demised premises and repair the same at the expense of the Lessee in accordance with the covenants and provisions of these presents and the expenses of such repairs shall be repaid by the Lessee to the Lessor on demand.

(11) To permit the Lessor and the tenants or occupiers of the adjoining premises and in particular of the premises of which the demised premises form part and their respective agents or workmen at any time or times during the said term at reasonable hours in the daylight to enter upon the demised premises for executing repairs or alterations

of or upon such adjoining premises making good to the Lessee all damage thereby occasioned.

(12) To permit the Lessor and the tenant or occupiers for the time being of the premises of which the demised premises form part or any person or persons authorised by them respectively in that behalf to enter upon the demised premises for the purpose of constructing laying down altering repairing cleansing emptying or maintaining any sewers watercourses cesspools gutters drains waterpipes electric wires or gas pipes in connection with or for the accommodation of adjoining property and in particular the premises of which the demised premises form part doing as little damage as may be to the demised premises and restoring the surface of the soil and everything erected thereon without any unreasonable delay but without making any compensation for any temporary damage or inconvenience.

(13) Within twenty-one days next after any absolute transfer assignment or devolution of his interest under this present Lease in the demised premises or any part thereof to give notice in writing of such transfer assignment or devolution and of the name quality and place or places of abode of the transferee or transferees or assignees or other person or persons in whom the said interest is thereby vested to the Lessor or its solicitor and produce to him the instrument of such transfer assignment or devolution and pay to him a fee of One Pound One Shilling for the registration of such notice.

4. It is hereby agreed and declared between the Lessor and the Lessee as follows:— Disputes to be referred to lessor.

(I) In case at any time during this demise any dispute shall arise between the Lessee and any other of the tenants of the Lessor relating to the premises to them respectively demised or the party or other walls structures roofs fences ways passageways pathways sewers drains pipes or the combined drainage system (if any) or watercourses and other easements rights or appurtenances whatsoever relating or

belonging thereto or any repairs thereto or the contributions in respect of the expenses of such repairs as herein provided or any nuisance or annoyance arising therefrom then and in every such case such dispute (provided the other party thereto shall also have agreed to become bound so to refer the same) shall be referred to the determination and award of the surveyor for the time being of the Lessor which determination and award shall be final and binding on the Lessee.

(II) If the rents hereby reserved or any part thereof shall be in arrear for twenty-one days after the same shall have become due whether the same shall have been legally demanded or not or in the event of any breach non-performance or non-observance of any of the covenants conditions and agreements on the part of the Lessee herein contained or of his becoming bankrupt or having a receiving order made against him or entering into any composition or arrangement for the benefit of his creditors then and in any such case it shall be lawful for the Lessor or any person or persons duly authorised by it in that behalf to enter into or upon the demised premises or any part thereof in the name of the whole and peaceably to hold and enjoy the same henceforth as if these presents had not been made but without prejudice to any right of action or remedy of the Lessor in respect of any antecedent breach of any of the covenants by the Lessee hereinbefore contained.

Lessor's covenants:

5. THE Lessor hereby covenants with the Lessee in the manner following (that is to say):—

to pay road charges;

(I) That the Lessor will pay all road charges in respect of any road abutting on or adjoining the demised premises if and when the same is taken over by the local authority except any such arising by alterations or damage done thereto by the Lessee or his servants or agents.

to insure;

(II) That the Lessor will adequately insure the said premises against fire and if it thinks necessary against damage by aircraft enemy action loss of rent or otherwise and in case of destruction or damage by fire will rebuild or

reinstate the same and will when required produce to the Lessee the policy or policies of such insurance and the receipt for the last premium for the same.

quiet enjoyment.

(III) That the Lessee paying the rent hereby reserved and performing and observing the several covenants conditions and agreements herein contained and on his part to be performed and observed shall and may peaceably and quietly hold and enjoy the demised premises during the term hereby granted without any lawful interruption or disturbance from or by the Lessor its successors in title or any person or persons claiming under or in trust for it or them.

6. It is declared that all rights and obligations of the Lessor and Lessee respectively under these presents shall be incident to the reversion expectant on this lease and the leasehold interest hereby created respectively and shall pass and devolve therewith on any alienation or devolution thereof.

Notices.

7. It is hereby agreed that any notice hereby required or authorised to be given to the Lessor or Lessee respectively shall be in writing and may be given in any of the modes provided by section 196 of the Law of Property Act 1925 with respect to notices to be given to lessors or lessees (as the case may be) under that Act.

8. It is hereby declared and certified that the transaction hereby effected does not form part of a larger transaction or of a series of transactions of which the amount or value or the aggregate amount or value of the consideration other than the rent exceeds the sum of Five Hundred Pounds.

In witness whereof the Lessor has caused its Common Seal to be hereunto affixed and the Lessee has hereunto set his hand and seal the day and year first above written.

First Schedule.

Rights and Benefits Granted to the Tenant.

(1) The right for the Lessee and all persons authorised by it to the use at all times of the passageway delineated on the plan hereto and thereon coloured green the Lessee from time to

time contributing a sum in proportion of the expenses of keeping and maintaining such passageway in good repair.

(2) The right to use keep and maintain at the position marked "A" on the said plan or at such other part of the said passageway as the Lessor may from time to time direct a dust bin of a design approved by the Lessor such dust bin to be kept clean and disinfected and free from smell.

(3) The free right of passage at all times and for all purposes to and from the demised premises over the said road called —— aforesaid and over all other roads and ways made or hereafter to be made for the accommodation of the lessees tenants and occupiers of the Lessor's estate of which the demised premises form part.

(4) The free right of passage and running of water and soil gas and electricity from and to the demised premises through all sewers drains watercourses water pipes cisterns gutters gas pipes and electric wires which are now or may hereafter be in or under or along any of the roads comprised in the said estate and under or upon the land delineated on the plan hereto and thereon coloured green and in or about the premises.

(5) The right at all reasonable times to enter upon the premises adjoining the demised premises and in particular the premises of which the demised premises forms part for the purpose of executing repairs and alterations to the demised premises as the same shall be necessary making good to the tenants or occupiers of such adjoining premises all damage thereby occasioned.

(6) The right so far as the Lessor can grant the same to use the joint drainage system of the premises (if any) in common with all others using the same the Lessee from time to time contributing a due proportion of the expenses (if any) of keeping and maintaining such joint drainage system in a proper state of repair.

Second Schedule.

Exceptions and Reservations.

(1) The right at any time hereafter to build or rebuild on any adjoining or neighbouring land of the Lessor according to

such plans (whether as to height extent or otherwise) and in such manner as the Lessor or its successors in title shall think fit notwithstanding any interference thereby occasioned to the access of light or air to the premises hereby demised.

(II) The right for the Lessor and the tenants and occupiers of the adjoining premises including the premises of which the demised premises forms part or any person or persons authorised by them respectively to enter upon the demised premises or any part thereof at all reasonable times for any of the purposes mentioned and subject to the provisions contained in the covenants on the part of the Lessee to permit such entry hereinbefore contained.

(III) The right of support to the buildings adjoining the demised premises as the same is at present enjoyed from the demised premises.

(IV) The free and uninterrupted passage and running of water and soil gas and electricity from and to the other buildings and land of the Lessor and its tenants adjoining or near to the demised premises through the sewers drains watercourses water pipes cisterns gutters gas pipes electric wires and meters which are now and may hereafter during the term hereby granted be in or under the demised premises.

(V) (*e*) The right of support to the upper maisonette as the same is at present enjoyed from the demised premises.

Third Schedule.

Stipulations and Conditions.

1. The Lessee will at his own expense properly maintain and keep the fences on the sides of the premises hereby demised marked "T" on the plan annexed hereto in good and substantial repair and condition.

2. The Lessee will not erect any building on or over the garden or yard of the maisonette hereby demised or any part thereof without the license in writing of the Lessor or its successors in title.

3. The Lessee will not make any alteration in or addition to

(*e*) This applies only to the lower maisonette.

the height sides front back roof walls timbers or elevation of the maisonette hereby demised or the yard or garden wall or fences thereof without such license as aforesaid.

4. The Lessee will not without such license as aforesaid use the premises hereby assured or permit the same to be used for the purpose of any manufacture trade or business of any description or for any inn or tavern or for the sale of beer wine or spirits And will not place or allow to be placed any show board placard or brass plate on any part of the said premises but will except with such license as aforesaid use and occupy the same as and for a private dwelling only.

5. The Lessee will not do or permit to be done any act or thing in or upon the said premises which shall or may be or grow to the annoyance nuisance damage or disturbance of the Lessor or its assigns or its or their tenants.

6. The Lessee will use the garden belonging to the said maisonette and premises as a garden only and will not convert the same to any other use whatsoever.

THE COMMON SEAL of the Lessor was hereunto affixed in the presence of }

Director

Secretary

SIGNED SEALED AND DELIVERED by the Lessee in the presence of }

Form 2.

Mortgage of an Additional Policy of Life Assurance (as Further Security) and Variation of Original Mortgage, a Surety being Released.

Drafted by Dr. E. O. Walford, LL.D., Solicitor (*a*).

Date. THIS MORTGAGE is made the —— day of —— 19— BETWEEN

Parties. —— of *etc.* in the County of —— (hereinafter called "the

(*a*) Stamp *ad valorem.*

Borrower") of the first part the said —— (hereinafter called "the Husband") of the second part and —— of *etc.* (hereinafter called "the Lender") of the third part

Recitals: (1) Principal mortgage;

WHEREAS this deed is supplemental to a mortgage (hereinafter called "the principal mortgage") dated the —— day of —— and made between the same parties as are parties hereto and in the same order being a mortgage of (i) a policy of life assurance effected with the —— Assurance Company Limited (hereinafter called "the original policy") whereby the sum of £—— [with profits] was assured to be paid to the Borrower as therein appeared or to the executors administrators or assigns of the Borrower on the death of the Borrower and (ii) the [one fourth] share of the income arising during the life of the Borrower from the residuary estate of one —— deceased who died on the —— day of —— the said mortgage being effected for securing the repayment to the Lender of the sum of £—— with interest thereon as mentioned in the principal mortgage

(2) State of mortgage debt;

AND WHEREAS the said sum of £—— is still owing on the security of the principal mortgage [and no interest thereon has been paid up to the date hereof]

(3) Dispute as to intention of mortgage;

AND WHEREAS certain disputes have arisen between the parties hereto as to the true intention and effect of the principal mortgage and as to whether the principal mortgage carried out the true intention of the parties at the date of the execution thereof

(4) Terms of compromise;

AND WHEREAS terms of compromise have been agreed between the parties hereto one of the terms of such compromise being that the Borrower should effect a further policy of assurance on her life for securing the sum of £—— and that such further policy should be mortgaged to the Lender as further security for the repayment of the said sum of £—— and the interest thereon

(5) Agreement for release of surety.

AND WHEREAS the Lender has agreed to release the Husband from all liability as [joint covenantor] *or* [surety] under the principal mortgage and has also agreed to the variation of certain of the covenants on the part of the Borrower as hereinafter appears

NOW THIS DEED WITNESSETH as follows:—

1. IN pursuance of the said agreement and in consideration of the Lender waiving his requirement of the immediate payment of the sum of £—— and interest the Borrower as beneficial owner hereby assigns unto the Lender ALL THAT the policy of assurance effected with the —— Assurance Company Limited and numbered —— (hereinafter called "the further policy") whereby the sum of £—— is assured to be paid to the Borrower on the —— day of —— 19— or to her executors administrators and assigns on the previous death of the Borrower and all other moneys (if any) to become payable under the said policy and all benefits and advantages in connection therewith TO HOLD the same unto the Lender absolutely but subject to the like equity of redemption on payment of the principal moneys and interest as is subsisting under the principal mortgage and with the like power of sale and other provisions for securing and obtaining payment of the said principal moneys and interest and with the benefit of the like covenants (except as modified by these presents) on the part of the Borrower and subject to the like provisions and powers in all respects as are contained or implied in or conferred by the principal mortgage (as hereby modified) in relation to the original policy comprised in the principal mortgage to the intent that the further policy shall form an additional security for the repayment of the said principal moneys and interest and as if the further policy had been included in and assigned by the principal mortgage.

Assignment of further policy as additional security.

If principal mortgage dated prior to January 1, 1926.

[2. THE principal mortgage shall henceforth be construed and take effect in respect of the statutory powers of the Lender as if it had been executed after the commencement of the Law of Property Act 1925 Provided that nothing in this present clause contained shall in any way abridge or curtail any express powers of the Lender or other provisions in the principal mortgage contained the intention being that such express powers and provisions shall (except as modified by these presents) remain

[If principal mortgage before 1926.]

and be in full force and effect both as regards the original policy and the further policy.]

3. SECTION 93 of the Law of Property Act 1925 restricting the Lender's right of consolidation shall not apply to this security. [Mortgagee to have right of consolidation.]

If surety is being released.

[4. THE Lender hereby releases and discharges the Husband and his estate and effects from the covenants entered into by the Husband [jointly and severally with] *or* [as surety for] the Borrower and from all liability in respect thereof.] [Release of surety.]

If mortgage not to be called in during lifetime of Borrower.

[5. THE LENDER hereby covenants with the Borrower that the Borrower duly performing and observing the covenants and obligations on her part contained in or arising under the principal mortgage (as modified by these presents) and in and under this present deed except as to repayment of the principal moneys he the Lender will not during the lifetime of the Borrower take any steps by notice action sale foreclosure or otherwise to enforce the repayment of the said sum of £—— or any part thereof.] [Mortgage not to be called in during life of borrower.]

6. AND IT IS MUTUALLY AGREED between the Lender and the Borrower as follows and the principal mortgage shall henceforth be read and construed accordingly:

[(a) That no interest [shall be deemed to have accrued or] shall accrue or commence to be payable on the said principal sum of £—— to the Lender until the death of the Borrower.] [No interest payable until death of borrower.]

(b) The joint and several covenants by the Borrower and the Husband contained in clauses [3 and 4] of the principal mortgage shall henceforth take effect as covenants by the Borrower alone and the charge contained in clause [3] of the principal mortgage shall remain in full force and effect. Covenants by surety and borrower to be construed as if by borrower alone.

(c) Notwithstanding anything hereinbefore contained if any moneys shall become payable under the original policy the further policy or any policy substituted therefor Moneys payable under either policy to be

applicable towards discharge of moneys owing to lender.

respectively during the lifetime of the Borrower such moneys shall be receivable and retainable by the Lender and shall be applied by him in reduction (or discharge if the moneys so received shall be sufficient) of the principal moneys and other sums (if any) secured by the principal mortgage and these presents and any surplus shall belong and be paid to the Borrower.

Covenant by borrower not to revoke authority given to the trustees of the settlement to pay premiums on policies.

(d) The Borrower having given to the trustees of the will of the said —— deceased an irrevocable —— written direction to pay to the said —— Assurance Company all future premiums which shall become payable on the said original and further policies of assurance or any substituted policies out of the said [one-fourth] share of income in priority to all payments to which the Borrower is entitled under the said will the Borrower hereby covenants with the Lender that she will not so long as any moneys shall remain owing on the security of the principal mortgage and/or this present deed revoke the said written direction (*b*).

Definitions.

7. The expressions "the Borrower" and "the Lender" hereinbefore contained shall include their respective executors administrators and assigns.

In witness whereof the said parties to these presents have hereunto set their hands and seals the day and year first before written.

Form 3.

Will of a Testator Leaving a Wife and More than One Child, Making Provision for Maintenance out of a Reasonable Sized Estate to be Settled (*a*).

Drafted by Harold Potter, LL.B.

This is the last will and testament of me A B of *etc.*

Appointment of executors.

1. I hereby revoke all former wills and testamentary instru-

(*b*) The appropriate irrevocable authority must, of course, be given to the Trustees of the Settlement.

(*a*) The purpose of this will is to provide for a settlement on a wife and children so that they shall not be able to anticipate the capital, but

ments whatsoever heretofore made by me and I appoint C D of *etc.* and E F of *etc.* (hereinafter called "my Trustees") to be executors and trustees of this my will.

2. I DIRECT my Trustees to pay my just debts and testamentary expenses and subject thereto I make the bequests following:

(i) to my wife [free of all death duties] my personal chattels as defined by section 55 of the Administration of Estates Act 1925 (except ——) with the request not amounting to a trust that she shall make such personal gifts as she shall think proper to any relatives and intimate friends of mine (*b*) Specific legacies.

(ii) [*Here add any specific or pecuniary legacies*].

3. I DEVISE to my said wife my freehold [leasehold] house known as —— or any other house which shall be my residence at the date of my death [subject to any mortgages or charges affecting the same and then subsisting] (*c*) [such devise being free of all death duties]. Devise to wife.

4. SUBJECT as aforesaid I give devise and bequeath all the rest and residue of my real and personal estate whatsoever and wheresoever situate to my Trustees Upon Trust to sell call in and convert the same into money with power to postpone such sale calling in and conversion in their absolute discretion and to hold such property or the proceeds of sale thereof or the investments representing the same upon the trusts following:— Residue trust for sale and conversion.

(i) during the life of my said wife to pay the income to her or to apply the whole or such part of the income for the maintenance education or otherwise for the benefit of such one or more of my children or if I have only one child surviving me of such child until all such children Income of residue.

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to enable by discretion sufficient latitude if the fund is insufficiently large for an expenditure of capital to provide a business or businesses. It operates to substitute the discretionary trust in place of the restraint on anticipation and to indicate the breadth of this form of trust.

(*b*) The purpose of this legacy is to avoid unnecessary small legacies involving heavy rate of duty and to enable the wife to keep the home without interference by the residuary trust, and the same purpose is served by the ensuing specific devise of the house, but this must depend on the circumstances.

(*c*) A devisee takes subject to such charges but it may be convenient expressly to mention them to avoid disputes in the family.

or such one child as aforesaid have or has attained the age of twenty-one years as my Trustees shall think fit and after all my children shall have attained the age of twenty-one years to pay the income to my said wife as aforesaid or to such one or more of my children or to such one child as aforesaid in their absolute discretion And I direct that any surplus income arising in any year during the minority of my child or children as aforesaid shall be accumulated to be employed as capital or as income in my Trustees' discretion (*d*)

Trusts for children.

(ii) after the death of my said wife and if all my said children have not attained the age of twenty-five years [or married under that age] at her death to apply the whole or such part of the income for the maintenance education or otherwise for the benefit of such one or more of my children or if only one child of such child as they shall think fit and I direct that any surplus income arising in any year during a period not exceeding twenty-one years from my death (*e*) shall be accumulated to be employed as capital or income in my Trustees' discretion

(iii) after all my children shall have attained the age of twenty-five years or married under that age to pay the income during the lives of my children and the life of the last survivor of them to such one or more of my children or the issue of any of my children or the spouse of or the spouses of any one or more of my children in such shares as they shall in their discretion think fit (*f*)

(*d*) This direction to accumulate during minorities is valid: L. P. Act, s. 164 (1) (c).

(*e*) This limit is necessary in view of s. 164 of the Law of Property Act, 1925, but the direction, if it is omitted, is only void as to any excess, which does not in the course of human events commonly occur. In the event of only one child surviving the testator and the direction to accumulate ceasing to operate it would appear that the only child would be entitled to the whole of the income and could anticipate it, but this is an unlikely event where the testator has more than one child.

(*f*) This will constitute a discretionary trust preventing any child from anticipating by assigning or charging his life interest. An only surviving

(iv) after the death of my last surviving child to hold the capital and income Upon Trust for such one or more of my grandchildren as shall attain the age of twenty-five years [or marry under that age] in equal shares provided that if any grandchild shall not attain the age of twenty-five years [or marry under that age] within twenty-one years of the death of my last surviving child then such grandchild shall attain an absolute vested interest at the expiration of twenty-one years after the death of such last surviving child as aforesaid (*g*) Trusts for grandchildren.

(v) In default of any grandchildren or any grandchildren who shall attain the age of twenty-five years or marry under that age to hold the capital and income Upon Trust to divide the same between the personal representatives of such one or more of my children as shall have attained the age of twenty-five years or married under that age in equal shares between such children. Trust in default of grandchildren.

5. I DIRECT my Trustees as follows:— Power of advancement to wife;

(i) during the life of my said wife my Trustees shall have power to advance to my said wife a sum not exceeding £—— upon such security (if any) and with or without interest as they shall think fit for any business purposes without being responsible for any loss to the trust estate but such advance shall be repaid at the death of my said wife and form part of my estate

(ii) either during the life or after the death of my said wife my Trustees shall have power to advance a sum not exceeding £—— to any one or more of my said children for any purpose of which they approve and upon such security (if any) as they may think fit and in their discretion they may not require the sum to be repaid at to children.

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child will have no interest capable of assignment, even if he has no spouse, because on marriage the trustees could then pay the income to the spouse or to his children (if any).

(*g*) The proviso is inserted to avoid infringing the perpetuity rule; if the age of twenty-one is substituted for twenty-five the proviso is unnecessary. If all the children die before the grandchildren have attained twenty-five there is now the statutory power of maintenance under the Trustee Act, 1925, s. 31, which is not limited to a minority and seems sufficient.

the death of any such child but in such cases such advance shall be brought into hotchpot in ascertaining the share payable to the personal representatives of such child if no grandchild of mine shall attain a vested interest as aforesaid

Investment clause.

(iii) my Trustees shall have power to retain any of my existing investments at the date of my death in their present form whether or not they are sanctioned by law as trust investments without being responsible for any loss arising out of such retention as aforesaid (*h*)

Power to trustees to charge.

(iv) if my Trustees or either of them or any trustee who is appointed in substitution or addition for or to my Trustees is engaged in any profession or business and is employed by my Trustees for the time being for any such professional or business purpose he may receive remuneration according to the law or custom in such profession or business (*i*).

Dated the —— day of —— 19—.

Signed by the above-named testator as and for his last will in the presence of us both present at the same time who in his presence and in the presence of each other have hereunto subscribed our names as witnesses

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(*h*) This power is highly desirable where the fund includes certain commercial securities, as is commonly the case where the testator is a business or professional man.

(*i*) This clause is much wider than the usual clause, which seems to be limited to solicitors; in fact, a charging clause is highly desirable if responsible work is to be done by skilful trustees, and it will be found frequently that they do the work at a lower cost to the estate than by the employment of external experts. A trustee so employed would, it seems, be liable to indemnify the others in the event of a breach of trust.

Form 4.

Ticket for Use in Private Lottery Containing such Particulars as are Necessary in Order to Comply with the Betting and Lotteries Act, 1934 (*a*).

Drafted by Hannah Cross, of Lincoln's Inn.

FACE OF TICKET.

THE P. Q. R. CLUB.

No. . *For Members Only.*

Christmas Lottery.

Price of ticket — shillings (*b*).

This ticket acknowledges receipt of the sum of — shillings.

(*a*) Generally speaking, all lotteries are now unlawful, and persons connected with lotteries, whether as printers, distributors, promoters or lessors of premises, may be found guilty of an offence under the Betting and Lotteries Act, 1934, s. 22. Certain lotteries are deemed not to be unlawful; these exceptions are:—

(1) those among joint tenants;

(2) those conducted in accordance with the Art Union Act, 1846;

(3) small lotteries incidental to certain entertainments; see below;

(4) private lotteries.

But the lotteries numbered (3) and (4) in the list of exceptions are not unlawful only if they comply with the conditions set out in the Betting and Lotteries Act, 1934, ss. 23 and 24.

As regards private lotteries these conditions are to the following effect:—

(i) The lottery must be in Great Britain and must be promoted for one of the three following groups of persons:— *i.e.*, (1) the members of a society established and conducted for purposes not connected with gaming, wagering or lotteries; (2) persons all of whom reside on the same premises; (3) persons all of whom work on the same premises. (In connection with the first of these groups, it is worth noting that each local branch of a society is regarded as a separate society and cannot therefore run a private lottery in conjunction with headquarters or with any other branch.) It should be noted that "society" includes "club, institution, organisation or other association of persons by whatever name called".

(ii) The promoters must be members of the group holding the lottery, and, in the case of a lottery run for a society, must be authorised in writing by their governing body to promote the lottery. The promoters may not sell tickets to any person who is not a member of the group holding the lottery.

(iii) The whole proceeds, after deducting only expenses incurred for

Promoters (*c*).

A B of *etc.* (a member of the P. Q. R. Club.)
C D of *etc.* (do. .)

Private Lottery.

The sale of tickets or chances by the Promoters is restricted to the members of the P. Q. R. Club.

Prizes Regulations.

No prize won in this lottery shall be paid or delivered by the Promoters to any person other than the person to whom the winning ticket or chance was sold by them (*d*).

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printing and stationery, shall be devoted to providing prizes or (in the case of a lottery among the members of a society) to prizes and/or purposes of the society.

(iv) No written notice or advertisement shall be shown other than a notice exhibited on the premises of the group concerned and whatever notice or advertisement appears upon the tickets. (Printers should therefore refuse to print a large number of notices or advertisements, which can have no justification.)

(v) The price of the ticket or chance must be stated on the ticket and must be the same on each ticket.

(vi) Each ticket shall state on the face of it the names and addresses of every promoter; the persons to whom the sale of tickets or chances by the promoters is restricted, and that no prize won in the lottery shall be paid or delivered by the promoters to any person other than the person to whom the winning ticket was sold.

(vii) No prize shall be paid or delivered except in accordance with this statement.

(viii) No ticket or chance shall be issued except by way of sale and upon receipt of the full price and no money so received shall be returned in any circumstances.

(ix) No tickets shall be sent through the post.

If any of the conditions specified are broken, the promoters and the person who breaks the condition are guilty of an offence. It is submitted that a printer printing a ticket in the form given here, or a promoter using such a ticket (and complying with the other conditions) would be safe. A person charged only by reason of his being a promoter has a good defence if he can prove that the condition was broken without his knowledge.

For an exhaustive treatment of the law relating to lotteries, see Street on Gaming (1937), Pt. II, Chap. III.

(*b*) Every ticket *must* bear the same price.

(*c*) The name and address of each promoter must be given.

(*d*) A private lottery ticket *must* contain the information given on the face of this draft. There appears to be no objection to putting additional matter on the ticket, so long as the necessary information is not obscured. For these reasons, some semi-advertising paragraphs have been given on the back of the ticket.

BACK OF TICKET.

THE P. Q. R. CLUB.

BIG MONEY PRIZES.

Tickets can only be obtained from the Promoters. For names and addresses see face of ticket.

The Promoters have been authorised in writing by the Governing Body to promote the lottery.

The whole proceeds of the sale of tickets will (after deducting only expenses incurred for printing and stationery) be devoted to providing PRIZE MONEY.

The results of this lottery will be announced by the Promoters at the meeting of the members of the P. Q. R. Club on the —— of —— 19— (*e*).

Winners will be notified.

(*e*) The list of prizewinners could, it is submitted, be exhibited upon the premises; but pending judicial decisions upon the terms of ss. 22—24, verbal announcements may be preferred.

As regards small lotteries.—In the case of a small lottery incidental to an entertainment no special form of ticket is required. But such lotteries are not unlawful only, if the following conditions are observed in connection with the promotion and conduct of the lottery:—

(i) The lottery must be incidental to a bazaar, a sale of work, a fête or some other entertainment of a similar character.

(ii) The whole proceeds of the entertainment (including the proceeds of the lottery itself) must, after deducting the expenses of the entertainment and of the lottery and a sum not exceeding £10 for the buying of prizes, be devoted to purposes other than private gain.

(iii) There shall be no money prizes.

(iv) The sale of tickets and chances and the announcement of the result of the lottery must take place during the entertainment and on the premises where the entertainment is being held.

(v) The lottery must not be the only substantial inducement to persons to attend the entertainment.

Generally.—The form of the Act is such that almost any step connected with any lottery may be made the subject-matter of proceedings. Thereupon the defendant has to prove—

(1) that the lottery in question is one of the type deemed to be not unlawful; and

(2) that at the date of the alleged offence he believed and had reasonable ground for believing that none of the conditions required to be observed had been broken. If he is to prove these facts, it is essential that he should have had in mind, throughout the course of the lottery, the conditions indicated in this note.

Form 5.

Licence to Publish a Copyright Work in a Newspaper or other Periodical (*a*).

MEMORANDUM OF AGREEMENT made this —— day of —— 19— BETWEEN A of *etc.* (hereinafter called "the Licensor") of the one part and the B Co. Ltd. whose registered office is situate at —— (hereinafter called "the Licensee") of the other part

WHEREBY IT IS AGREED as follows:—

Grant of licence.

(1) The Licensor hereby grants to the Licensee for the period of —— months from the date hereof licence to print and publish in all editions of the —— in serial form the work entitled —— written by ——

Rights of licensee.

(2) The Licensee shall have the right to publish all or such part (*b*) of the said work as it thinks fit and [subject to the consent of the Licensor] to omit or alter names or dates and to omit, condense or expand any passage or passages in the said work as it thinks fit

(3) The Licensee shall have the right to publish or omit in connection with the said serialisation any of the illustrations in the said work or to alter and publish in such altered form any of the said illustrations or to publish other illustrations

Warranty of licensor.

(4) The Licensor agrees and warrants that he has the right to grant this licence and to grant the right or liberty to do any

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(*a*) Stamp *ad valorem*. It is becoming a common practice for authors to grant to newspapers a right to reproduce such portions of a book as the newspaper considers would be suitable for its readers. In such a case, it is obvious that the newspaper does not want the copyright; an exclusive licence to use the work for the purpose for which it is required is all that is necessary: see Copyright Act, 1911, s. 5 (2); *Re Jude's Musical Compositions*, [1907] 1 Ch. 651. The owner of the copyright is then free to use the work subject only to the limited rights of the licensee.

(*b*) Generally the newspaper requires a right to modify any work submitted to it, as most works are not suitable for reproduction in their entirety. When such a clause as this is inserted, the licensor should consider whether he wishes to reserve any right to withhold approval from proposed alterations. In most cases the licensee requires a free hand, and this should be taken into consideration in determining the price to be paid.

of the things set out in clauses 2 and 3 hereof and that the said work has not been published hitherto and shall not be published in book or serial form in any newspaper magazine or other periodical until after the completion of its publication in the serial form aforesaid in the —— or until the expiry of —— months from the date hereof

(5) The Licensee shall on or before the —— day of —— pay to the Licensor the sum of £—— Consideration.

(6) In the event of the Licensee not publishing the said work unaltered in the form submitted by the Licensor the Licensee hereby agrees at all times to keep the Licensor his executors administrators and assigns effectually indemnified against all actions proceedings claims and demands by reason of any alterations or additions to the said work made under the powers conferred by clauses (2) and (3) hereof or any of them. Indemnity.

As witness *etc.*

Form 6.

Receipt by Personal Representatives of a Mortgagee.

Alternative Form where the Payment is made by the Personal Representatives of the Mortgagor (*a*).

We A of *etc.* and B of *etc.* as personal representatives of the within-named X who died on the —— day of —— and whose will we duly proved on the —— day of —— in the —— Probate Registry of —— [*or* letters of administration to whose estate was on the —— day of —— duly granted to us out of the —— Probate Registry of ——] hereby acknowledge that we have this —— day of —— received the sum of £—— representing the [aggregate] [balance remaining owing in respect

(*a*) Stamp 6d. for every £100 and also for any fractional part of £100 of the total amount at any time secured by the mortgage and further charge. If the receipt operates as a transfer the stamp duty is the same. This form is adapted from Form No. 2 in the Third Schedule to the Law of Property Act, 1925, and is intended to fulfil the requirements of s. 115 of the Act and to operate as a discharge of the mortgage. The receipt must be indorsed on or annexed to one of the mortgage deeds.

of the] principal money secured by the within [above] written [annexed] mortgage [and by a further charge dated the —— day of ——] together with all interest and costs the payment having been made by the within-named Y [*or* by Y of *etc.* the personal representative of the within-named Z whose will was on the —— day of —— duly proved by the said Y in the —— Probate Registry of —— *or* by Y of *etc.* the personal representative of Z to whom letters of administration to the estate of the within-named Z were on the —— day of —— duly granted out of the —— Probate Registry of ——] [and (*b*) such payment is made out of a fund properly applicable for the discharge of the said mortgage] [*or* this receipt shall operate as a transfer] and WE DECLARE that we have not hitherto made or given any assent or conveyance in respect of the legal estate in the mortgaged property and WE HEREBY acknowledge (*c*) the right of the said Y to production of the Probate of the Will of the said X [*or* letters of administration to the estate of the said X] (the possession of which is retained by us) and to delivery of copies thereof.

AS WITNESS *etc.*

(*b*) Where the mortgage is paid off by personal representatives, if the receipt is not to operate as a transfer under sub-s. 2 of s. 115 it should be made clear that sub-paragraph (*b*) applies and the mortgage is paid off out of money in the hands of the personal representative applicable for the discharge of the mortgage. If the receipt is to operate as a transfer this should be stated.

(*c*) The probate or grant of administration will be a link in the mortgagor's title and an acknowledgment is necessary: *Re Miller and Pickersgill's Contract*, [1931] 1 Ch. 511.

Form 7.

Notice to be Served by a Lessor under Section 146 of the Law of Property Act, 1925, and under Section 1 (1) and (2) of the Leasehold Property (Repairs) Act, 1938, in respect of a Breach of Covenant to Keep or Put in Repair during the Currency of the Lease a House of a Rateable Value of One Hundred Pounds or Less, where at the Date of the Service of the Notice Five Years or More of the Term of the Lease Remain Unexpired (*a*).

Drafted by Lionel A. Blundell, LL.M., Barrister-at-Law.

To A [*lessee*] the lessee of the house buildings and premises situate *etc.* comprised in a lease dated *etc.* and made *etc.* and to all others whom it may concern.

TAKE NOTICE as follows:

1. By the above mentioned lease the lessee covenanted [*set out verbatim the covenant*[*s*] *relied upon*].

2. The above mentioned covenant[s] has [have] been broken and the particular breaches which are complained of are committing or allowing the dilapidations mentioned in the schedule hereto.

3. I require you to remedy all the aforesaid breaches [and to make compensation in money for such breaches].

4. On your failure to comply with this notice within —— calendar month[s] it is my intention to [re-enter upon the

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(*a*) A notice in the form specified in s. 146 of the Law of Property Act, 1925, and containing the particulars required by s. 1 (4) of the Leasehold Property (Repairs) Act, 1938, must now be served by the lessor in every case where he intends either to enforce a forfeiture or to bring an action for damages in respect of a breach of covenant of the nature and in the circumstances specified above. See the article on the Leasehold Property (Repairs) Act, 1938, in this volume of *The Conveyancer*. Since by that Act certain statements in the notice must be in characters not less conspicuous than those used in any other part of the notice, it is desirable that the entire notice, including headings and initial words, should be set out in a uniform type. The first part of this form is based upon a form given in Key & Elphinstone.

said premises and] claim damages for breach of the said covenant[s] (*b*).

5. The lessee is entitled under the Leasehold Property (Repairs) Act 1938 to serve on the lessor a counter-notice claiming the benefit of the said Act.

6. Such counter-notice may be served within twenty-eight days from the date of the service upon the lessee of this notice.

7. Such counter-notice must be in writing and may be served upon the lessor by handing the same to him personally. Such counter-notice shall also be sufficiently served if it is left at the last-known place of abode or business of the lessor in the United Kingdom. Such counter-notice shall also be sufficiently served if it is sent by post in a registered letter addressed to the lessor at the aforesaid place of abode or business and if that letter is not returned through the post undelivered; and that service shall be deemed to be made at the time at which the registered letter would in the ordinary course be delivered (*c*).

8. The name and address for service of the lessor is ——.

Dated this —— day of —— 19—.

(Signed) B, lessor.

THE SCHEDULE ABOVE REFERRED TO.

(*b*) The lessor cannot re-enter or bring an action to enforce a forfeiture upon the ground of a breach of covenant until the lessee has had a reasonable time, from the date of the service upon him of the notice, for remedying the breach (Law of Property Act, 1925, s. 146). An action for damages cannot be commenced until the expiry of one month after the date of the service of the notice (Leasehold Property (Repairs) Act, 1938, s. 1 (2)), so where it is intended to pursue both remedies concurrently a reasonable time, not being less than one calendar month, should be specified. The words "re-enter upon the said premises and" should be deleted if damages only are to be claimed.

(*c*) Under s. 1 (4) of the Leasehold Property (Repairs) Act, 1938, the notice must contain a statement specifying the manner in which, under that Act, a counter-notice may be served. By s. 7 (2) of the same Act, the provisions of s. 196 of the Law of Property Act, 1925, are made applicable to the service of counter-notices.

Form 8.

Settlement to Comply with Directions for a Settlement Contained in a Will (*a*).

Drafted by A. H. Withers, of Lincoln's Inn.

THIS ASSIGNMENT made the —— day of —— 19— BETWEEN A of *etc.* (hereinafter called "the Settlor") of the one part and B of *etc.* C of *etc.* and D of *etc.* (hereinafter called "the Trustees") of the other part WITNESSETH and it is hereby declared as follows:— Parties. Witnesseth.

1. This assignment is executed by the Settlor in order to comply with the provisions of clause —— of the will of —— formerly of —— in the county of —— deceased who was the father of the Settlor and died on the —— day of —— and is hereinafter referred to as the testator and whose will dated the —— day of —— and a codicil thereto were proved by the Trustees in the Principal Probate Registry on the —— day of ——. Statement of intention.

2. Clause —— of the said will of the testator is hereinafter referred to as the forfeiture clause and a copy of the forfeiture clause is set out in the Schedule hereto. Forfeiture clause.

(*a*) Stamp *ad valorem*. This form is intended to get over the difficulty of construing a provision in a will which requires a beneficiary to settle certain specified portions of the beneficiary's own property on the trusts of the will. If the beneficiary is to forfeit his interest under the will if he fails to fulfil the requirements of the testator, it is essential for him to do so. In many cases, however, the will is so worded that it is far from clear as to what property is to be settled and what are to be the trusts. The fact that the beneficiary executes a settlement, which is intended to fulfil the testator's requirements and which satisfies the trustees of the will, is not of itself sufficient. If, through some error of drafting or interpretation of the trusts of the will, the settlement made by the beneficiary in some way fails to comply with the requirements of the will a forfeiture will result: *Commissioners of Inland Revenue* v. *Raphael*, [1935] A. C. 96. The best method of avoiding the risks which arise, except in the simplest cases, of interpreting the testator's directions and of then giving effect to such interpretation is, as is done in this form, to follow the language of the will itself, so that the settlement must have the same meaning as the will whatever that meaning may be.

Assignment.

3. The Settlor hereby assigns unto the Trustees:—

All the property which is in the forfeiture clause described by the following words in such clause namely "All the share to which my said son shall by virtue of the foregoing appointment become entitled in the property subject to the trusts of my Marriage Settlement and the income thereof respectively (other than income accruing during the said period of six calendar months)" and (by way of assignment and not of exception) all other if any the property which has within six calendar months from the death of the testator to be transferred to or vested in the Trustees or Trustee of the will and codicil of the testator in order to prevent the forfeiture clause taking effect

Declaration of trust.

To HOLD the same UNTO the Trustees UPON the trusts and with and subject to the powers and provisions which in the forfeiture clause are referred to by the following words in such clause namely "Upon the same trusts and with and subject to the same powers and provisions as are hereinbefore declared concerning my residuary estate and so as for all purposes or as nearly as may be to form one fund together with my residuary estate".

IN WITNESS *etc.*

THE SCHEDULE ABOVE REFERRED TO.

This Schedule is a copy of Clause —— of the said Will of the Testator.

PROVIDED ALWAYS and I declare that if my said son A shall survive me and shall not within the period of six calendar months after the date of my death effectually execute and deliver to my Trustees all deeds and documents necessary or proper for transferring to or vesting in my Trustees all the share to which my said son shall by virtue of the foregoing appointment become entitled in the property subject to the trusts of my Marriage Settlement and the income thereof respectively (other than income accruing during the said period of six calendar months) and for settling such premises thenceforth upon the same trusts and with and subject to the same powers and

provisions as are hereinbefore declared concerning my residuary estate and so as for all purposes or as nearly as may be to form one fund together with my residuary estate then I declare that my said son shall for all purposes so far as regards the trusts hereinbefore declared of my residuary estate be deemed to have died at the expiration of such period of six calendar months without ever having been married and I declare that all costs and expenses incurred by such son in complying with the provisions of this Clause shall be paid by my Trustees out of my estate.

Form 9.

Deed of Trust Establishing Charitable Home out of Moneys Subscribed for that Purpose. Founder to have Overriding Powers except as to Financial Matters (*a*).

Drafted by E. O. Walford, LL.D., Solicitor.

TO ALL TO WHOM THESE PRESENTS SHALL COME I —— of *etc.* SEND GREETINGS:

WHEREAS:—

Endowment.

(1) The premises described in the Schedule hereto and shortly known as —— have been purchased with donations subscribed and paid by various persons for the purpose of establishing and maintaining a charity the objects of which are hereinafter declared and set forth

Equipment of premises as home.

(2) Out of the moneys subscribed for the purposes aforesaid substantial sums have been expended in furnishing and equipping said premises for the said purposes and all donations now in my hands and so subscribed as aforesaid and further donations now being and to be subscribed from time to time are being or will be applied to and for the said purposes and in the running

(*a*) It is considered that the trusts of this deed are solely charitable and that if the income is solely applicable as provided in clause 12 the income of the Charity is exempt from income tax (all Schedules) subject to certain minor exceptions, *e.g.*, as to houses occupied by certain members of the staff.

expenses of the said charity and generally for the purposes and in accordance with the trusts and provisions hereinafter set forth

Property to be vested in Official Trustee.

(3) The legal estate in the said premises is now vested in [me] and is intended to be vested in [the Official Trustee of Charity Lands] (*b*)

NOW KNOW ALL MEN BY THESE PRESENTS and it is hereby declared as follows:—

INTERPRETATION CLAUSE.

Interpretation.

1. (i) The term "the Founder" shall mean the said —— only

(ii) The term "the Warden" shall include the Founder so long as he shall be acting as Warden.

THE TRUST PROPERTY.

Trust property.

2. THE property intended to be subject to the trusts of these presents consists of the said land and premises at —— described in the Schedule hereto (hereinafter called "the Home") and the furniture and other chattels now in or about the Home or the grounds thereof and the donations so subscribed as aforesaid (so far as the same have not been expended in manner aforesaid) and all donations whether in money or in the form of property hereafter subscribed or given to the Charity and the investments from time to time representing the same.

(*b*) Alter accordingly if this is not intended. The advantages of vesting the land in the Official Trustee of Charity Lands are (*inter alia*) that the difficulties under the Mortmain Acts disappear and that as the Official Trustee has perpetual succession the making of title is simplified for all time. The difficulties which arise in connection with title where a number of trustees have been appointed and records of their movements have not been kept will be appreciated by practitioners. Although Peto's Act (as extended later) and the Trustee Acts have assisted materially, considerable trouble in proving title can still arise where careful records and timely appointments of new trustees have not been made. As the vesting of the land in the Official Trustee does not involve any material interference with the general conduct of the affairs of the Charity (unless the settlor *desires* the Charity to be administered pursuant to a scheme settled by the Charity Commission), such vesting appears to be desirable in the absence of special circumstances.

Names and Purposes of the Charity.

3. The name of the Charity shall be The —— Charity (hereinafter called "the Charity"). Name of charity.

4. The object of the Charity shall be the establishment and maintenance of a home for the purpose of affording the means of physical or mental recuperation to the sick or suffering of either sex and of all ages and those in need of rest by reason of the stress and strain caused or partly caused by the conditions in which they ordinarily live or work. Object of charity.

5. Medical aid will at all times be available and will be recommended and supplied in all cases of illness mental or physical whenever it appears to be needed. Medical aid.

Patients.

6. The Home will be open to patients of all forms of thought and belief. Home open to persons of all forms of belief.

7. Whilst he is the Warden the said —— alone shall decide what persons are suitable for admission as patients. And after he shall cease to be Warden the Warden from time to time of the Charity shall (subject to any directions of the Council) decide what persons are suitable for admission to the Home. The medical officer to the Charity shall be consulted in cases where it is doubtful whether the Home and its general practices are suitable to any intended patient. Admission of patients.

[8. Patients shall whenever practicable and desirable in their own interests be encouraged to occupy their hands and minds in the carrying out (under the direction of the staff or of persons employed by the Charity for that purpose) of useful work such as arts and crafts or other handiwork or other suitable occupation but any profits arising from any work so carried out or from the sale of articles made or otherwise arising from any such work or occupation shall belong to and be treated and applied as income of the Charity and shall not be used for the personal and direct benefit of any member of the staff or of any patient.] Occupation for patients.

9. No patient shall be allowed seriously to disturb for others the peacefulness of the Home. The religious and Atmosphere of the home.

spiritual atmosphere of the Home [in accordance with the teachings of the Church of England] shall be considered to be of primary importance.

No spiritualistic practices permitted.

10. No psychic or spiritualistic teaching or practice shall be allowed and discussions or informal conferences on such matters between the patients themselves or between the patients and staff or any other persons at the Home shall at all times be firmly discouraged.

Payment by patients.

11. Any patient admitted to the Home may be required to pay towards the cost of his or her board and lodging and other benefits received by him or her a moderate amount according to his or her means and the amount of the payment shall be arranged so far as possible before admission. In considering the suitability of a person for admission to the Home his or her need and the economic situation of the Charity shall be taken into account but the financial position of such person shall not be a deciding factor. Fees for medical attendance or treatment shall be discharged by the patient where reasonably possible but in suitable cases the income of the Charity shall be drawn upon for part or the whole of such fees. A patient may however at his or her own expense employ his or her own medical practitioner.

Income.

Application of income.

12. The income of the Charity however arising whether from investments donations or payment by patients or profits resulting from any trade carried on by the Charity or by beneficiaries (as such) of the Charity shall be solely applicable and shall be used for the running expenses of the Charity and the property thereof including rates taxes rents insurance and other outgoings and for the upkeep and improvement of the Home and the contents and the gardens and grounds thereof and the welfare of the patients therein and the payment of the staff and generally for increasing the efficiency of the Charity for the purposes for which it is created.

Extraordinary repairs.

13. The cost of extraordinary repairs or other such expenditure as last aforesaid may if the Founder or failing him the

Council consider it desirable be defrayed out of the invested funds of the Trust except as to any funds subscribed upon the terms of a special trust precluding such application.

MANAGEMENT.

Founder to be warden and president of council.

14. THE Founder shall be the Warden of the Charity and President of the Council during his life or until he shall resign office or shall cease to be a Member of the Council. After the Founder shall die or resign office or otherwise cease to hold office as Warden the power of nomination and dismissal of the Warden from time to time of the Charity and of fixing his remuneration and period of his engagement shall be vested in the Council.

Founder to have full control except as to financial matters.

15. (1) So long as the Founder shall be a Member of the Council all powers and authorities vested in the Council shall (save as hereinafter provided) be vested in him alone and he shall have full power and authority in all matters relating to the management and control of the Charity (save only as hereinafter provided) and all other Members of the Council shall be bound to conform to his directions regarding the affairs and conduct of the Charity (save as hereinafter provided) and so long as such directions shall be in conformity with the trusts and provisions declared and contained in these presents

Council to have full control of finance.

(2) The Council shall have full control and responsibility in all matters of finance free from any control by the Founder under sub-clause (1) of this present clause including the payment of stipends remuneration of the staff generally and in particular shall determine what stipend or other remuneration shall be paid to the Warden (including the Founder while acting as Warden) or to other members of the staff or to any other persons employed in connection with the activities of the Charity

Full control by Council after Founder ceases to be a Member of Council.

(3) After the Founder shall cease to be a Member of the Council the administration of the trusts of these presents and the management and control of the property and affairs of the Charity shall be vested in the Council.

Qualification of future wardens.

16. AFTER the Founder shall have ceased to be Warden every future Warden shall be ——. No Warden other than the Founder shall be appointed to hold office as Warden for a longer

period than five years but nothing herein shall prevent the Council from renewing the appointment by resolution for such further period or periods from time to time as the Council shall think fit but so that no such resolution shall be passed or shall operate to extend the Warden's tenure of office by a period of more than five years from the date on which his appointment or last renewed appointment (as the case may be) would otherwise determine by effluxion of time And any such resolution shall only be valid if passed during the year preceding the last-mentioned date.

COUNCIL.

First members of council.

17. THE Council shall consist of the President and [eight] other persons of whom the following shall be the first Council namely:—

Such Council shall in relation to the exercise of all statutory and other powers be deemed to be the Managing Trustees of the Home and its property both real and personal subject to any express provisions herein contained.

Power of nominating members.

18. (i) The power of nominating Members of the Council shall be vested in the Founder during his life so long as he shall be a Member of the Council and thereafter such power shall be vested in the Council.

Tenure of office.

(ii) Except as to the Founder's Members hereinafter mentioned such Members shall hold office during life or until ceasing to hold office pursuant to the provisions of clauses 25 and 26 hereof. Founder's Members shall hold office for life or until removed pursuant to the provisions of the next succeeding clause or of clauses 23, 24, 25 or 26 hereof.

Power for founder to nominate founder's members.

19. (i) IN the exercise of his power of nominating Members of the Council the Founder shall during his life so long as he shall be a Member of the Council be entitled to select and nominate any of the persons nominated as Members of the Council to be Founder's Members (herein referred to as "Founder's Members") but so that there shall not at any time

be more than five (*c*) Founder's Members of the Council in office at any one time. The Founder may during such period as aforesaid at any time remove any Member so nominated And upon any such Member vacating office (whether by removal as aforesaid or otherwise) the Founder may fill the vacancy by nominating a successor thereto And the Founder (during the like period) shall have the same right of removing such successor and of nominating his successor and the successor of that successor and so on indefinitely as the Founder has under this clause in relation to the original Founder's Member nominated as aforesaid.

(ii) Except as otherwise provided in these presents Founder's Members shall have the same rights and privileges as other Members of the Council.

First founder's members.

20. The following five Members of the first Council shall be deemed to be Founder's Members namely:—

Temporary forfeiture of right of founder to appoint founder's members.

21. In the event of the Founder not filling within twenty-one days after receipt of written notice of the vacancy which as aforesaid he is entitled to fill he shall forfeit his right of filling such vacancy until the next meeting of the Council and such vacancy may be filled by the Council. Any Member so appointed shall hold office upon the like terms as if appointed by the Founder as a Founder's Member.

Permanent forfeiture of right to appoint founder's members.

22. In the event of there being on the Council for a period of six consecutive months no Founder's Member actually appointed by him the Founder shall forfeit for ever his rights under clause 19 hereof but nothing herein shall prejudice his rights or powers under clause 18 hereof.

Vacation of office by founder's members.

23. At the end of three months after the Founder shall die or shall cease to be a Member of the Council all Founder's Members then holding office by virtue of his nomination shall vacate office. All vacancies occurring under this clause shall

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(*c*) Provision is made for five Founder's Members in this case in order to give controlling power to the Founder, the total number of Members being nine. Recalcitrant Members can thus be removed speedily. If the number is altered in this clause, clause 20 will require similar treatment.

forthwith be filled by the election of persons nominated by the Council. For this purpose the remaining Members or the sole remaining Member of the Council shall be deemed to constitute the Council.

Form of nomination or removal of founder's members.

24. Any nomination or removal by the Founder of a Member of the Council shall be by notice in writing signed by the Founder addressed to the Secretary of the Charity and delivered to the Headquarters for the time being of the Charity.

Vacation of office by members.

25. The office of Member of the Council shall be vacated on the happening of any of the following events:—

(a) If being a Founder's Member he is removed by the Founder under the powers in that behalf hereinbefore contained or

(b) If he resigns by notice in writing addressed to the Secretary of the Charity.

Power of council to remove members from office.

26. (a) Neither the Founder nor any Member of the Council (subject as to Founder's Members to the provisions hereinbefore contained) shall be removed from office unless the Council shall by special resolution declare on any of the grounds following that he be removed

(b) The only grounds on which such a special resolution may be proposed are that the Founder or such Member of the Council is of unsound mind or permanently incapacitated by mental or physical infirmity from the adequate performance of the duties of his office or is unfit to continue to perform the duties of his office in consequence of bankruptcy insolvency dereliction of duty notorious misconduct or other circumstances

(c) A resolution passed by the Council shall be a special resolution only if it has been duly passed by at least six Members present and voting at a meeting of the Council convened by at least seven days' previous written notice to all Members of the Council specifying in such notice the terms or general effect of the proposed resolution and that it is intended to propose the same as a special resolution.

Powers of Council.

Powers of council:

27. The Council shall for the purpose of carrying into effect the trusts declared by these presents have the following powers

but whilst the said —— shall be the President of the Council such powers shall be exercised only with his previous approval which may from time to time be granted in general or specific terms but it shall not be necessary that such approval shall be expressed in writing.

(1) To expend all moneys of the Charity in any manner which the Council may think fit and which shall be consistent with the trusts hereby declared and any particular directions of donors not inconsistent with the trusts hereby declared including the power to pay to Members of the Council all reasonable and proper travelling and other expenses incurred by them in attending meetings of the Council and generally in or about the affairs of the Charity (1) expenditure;

(2) To make from time to time by way of gift financial provision in relation to the retirement sickness and decease of the Warden and the staff of the Charity their widows and dependants and in furtherance thereof to establish contribute to and support funds for any such purpose (2) gifts and provision for staff;

(3) To make gifts of money in the free disposition of the Charity to other bodies having objects solely charitable (whether such objects are identical with or similar to the objects of the Charity or not) (3) gifts to other charities;

(4) To purchase accept by gift devise or bequest or to lease sell exchange mortgage charge or otherwise acquire or dispose of by legal means interests of any and every nature in freehold and leasehold lands buildings and hereditaments (including the Home and the lands thereto belonging or any part or parts thereof) of all kinds in Great Britain and elsewhere and in personal property of all kinds wheresoever situate and accept donations upon any special trusts within the limits of the trusts declared by these presents (4) to purchase or accept freehold or leasehold property and personal property;

(5) To hold in their names or to vest in the names of any three or more of the Council nominated by the Council for that purpose any property of the Charity as trustees or to apply to the Commissioners for an order vesting any real or leasehold property in the Official Trustee of Charity Lands (5) to hold in names of three or more members of the council investments of the charity;

or in other trustees (*d*) and to remove any individual trustee or trustees and to appoint new trustees and vest the aforesaid property in them to be held together with all income and profits derived therefrom and all accretions thereto subject to the directions of the Council but so that such directions shall at all times be in accordance with the trusts and provisions declared by these presents

(6) to form companies and to vest trust property therein;

(6) If thought expedient to cause to be formed and incorporated under the Companies Act 1929 or any Act amending or replacing that Act a company or companies registered with such memorandum and articles of association as the Council shall determine and to cause or procure such company to be a trust corporation within the meaning of the Trustee Act 1925 or any Act amending or replacing that Act and to transfer or cause to be transferred and vested in such company (or in any other trust corporation not so formed as aforesaid) any property held by any Members of the Council or any other person or persons in trust for the Charity but subject to the trusts affecting the same

(7) borrowing powers;

(7) To borrow money for the purposes of the Charity without security or upon the security of any real or personal property of the Charity and upon such terms as the Council shall determine subject to the consent of the Charity Commission if requisite

(8) investment of moneys;

(8) To invest any moneys from time to time available for investment as may be thought expedient in the names of trustees appointed by the Council and in such investments as the Council in its absolute and unfettered discretion deems suitable notwithstanding that such investments are not of a nature authorised by law for the investment of trust funds

(9) to make rules;

(9) To make rules for the government and management and general working and internal control of the Charity and the staff and patients which rules may be amended varied

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(*d*) It will be appreciated that there will be required in addition to this deed either a conveyance to Members of the Council or an application to the Charity Commission for an order vesting the property in the Official Trustee of Charity Lands. In the latter case the draft trust deed should be submitted to the Charity Commission.

annulled or added to as may from time to time be considered by the Council to be necessary or expedient for the better carrying out of the trusts declared by these presents but so that all such rules shall be in conformity with the trusts and provisions of these presents

[(10) to exercise all powers as if trust property vested in them as trustees.]

[(10) Generally to exercise such powers as would be exercisable by the Council if the property subject to the trusts hereof were vested in the Council as trustees thereof upon the trusts declared by these presents (*e*).]

Delegation to committees.

28. WHENEVER by or under the provisions of this Deed any power authority or discretion is conferred upon or any duty is imposed upon the Council or any consent or approval is to be given or any other deed act or thing is to be executed or done by the Council the Council may entrust and delegate to any committee or committees the exercise of such power authority or discretion the performance of such duty the giving of such consent or approval or the execution or doing of such deed act or thing and such entrusting and delegation may be either general or with reference to any particular case and shall be subject to such directions limitations and powers of revocation as the Council may decide.

Acts of majority to bind minority.

29. WHENEVER any such power authority or discretion has to be exercised any such duty performed any such consent or approval given or any such deed act or thing executed or done whether by the Council or any such committee as aforesaid such power authority or discretion may be exercised such duty performed such consent or approval given or such deed act or thing executed or done by a majority for the time being of the Members of the Council or of such committee as aforesaid who shall be present and voting at the meeting in question (so long as there shall be a quorum present at such meeting) and if so exercised performed given executed or done shall be as valid and effectual as if so exercised performed given executed or done by all the Members of the Council or of such committee as aforesaid.

Power of council to sue.

30. THE Council may (subject as hereinafter mentioned)

(*e*) See last note. If the property is being vested in *all* the Members of the Council this clause will not be required.

bring or defend any action or actions respecting the trust property or the affairs of the Charity in the name or names of the Council or may refer any difference disagreement or dispute to arbitration subject to any requisite certificate of the Charity Commissioners under section 17 of the Charitable Trusts Act 1853 or otherwise.

Power of council to make regulations

31. Subject to and in conformity with the trusts declared by these presents the Council shall have full power from time to time to make regulations for the summoning of meetings the custody of documents and the appointment of a clerk or secretary and the employment of an accountant and other officers or servants.

[and to wind up the trust].

[32 (*f*). If at any time the Charity shall be run at a loss and it is not in the opinion of the Council possible to run it efficiently with the funds under their control or if for any other reason it shall in the opinion of the Council be impossible to continue the activities of the Charity in accordance with the trusts hereby declared then the Council shall have power in their discretion to wind up the trust hereby created and (after payment thereout of all costs charges and liabilities) to transfer the property as well capital as income then held by them under the trusts hereof and so that the Council may transfer the same as a donation or donations to any one or more charitable institution or institutions.]

Power to cancel or vary trusts for fulfilling objects of the charity.

33. If at any time and from time to time the provisions contained in this Trust Deed or any of them prove to be unworkable or insufficient or otherwise of such a nature as to prevent or impede the proper fulfilment of the objects of these presents as hereinbefore set forth it shall be lawful for the Council by special resolution (as hereinbefore defined) to cancel or vary or add to all or any of the trusts powers or provisions of these presents by making such alterations or additions therein and thereto as in their unfettered discretion may seem desirable for the purpose

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(*f*) Clause 32 should not be inserted unless the draft Deed of Trust is put before and approved by the persons subscribing the moneys for establishing the Charity. If the body of persons subscribing is quite indeterminate this may be impracticable. In that event the clause could not properly be inserted.

of more effectually fulfilling the objects aforesaid but so that no change shall be made which shall alter the character of the Charity as an institution established for charitable purposes only. This power shall apply also to this trust deed as altered from time to time thereunder.

Rules for Conduct of Council.

Meetings and quorum.

34. The Council shall hold at least one meeting every year and until otherwise determined by the Council three Members shall form a quorum.

Appointment of president.

35. The President of the Council shall be the Chairman of all meetings of the Council at which he shall be present. After the Founder shall cease to be President of the Council the following provisions shall apply:—

(i) A President shall be appointed by resolution of the Council

(ii) Such President shall hold office until the first day of January of the year following his appointment and shall then be eligible for re-appointment until the following first day of January and so on from year to year.

Minimum of three members for effective proceedings.

36. So long as there shall be at least three Members of the Council all proceedings of the Council shall be valid and effective for all purposes.

Minutes to be kept.

37. There shall be duly entered in books kept for the purpose by the Secretary to the Trust minutes and records of all meetings and transactions of the Council in relation to the Trust.

Resolutions and voting.

38. Every resolution of the Council passed at a meeting as to any matter within the scope of their authority shall be binding on all the Members of the Council. In the event of an equality of votes the President of the Council shall have a casting vote. Any members or member dissenting from the decision of the Council as contained in any such resolution shall if so requested concur in executing and doing all such instruments and acts as may be requisite for the purpose of giving effect to such decision Provided that nothing herein shall qualify or affect the provisions of clause 29 of these presents or affect the validity of any deed

executed any document signed or any other act matter or thing done pursuant to the provisions thereof but on the contrary all such deeds documents acts matters and things shall be valid and effective notwithstanding that any such dissenting Members or Member as last mentioned shall not join or concur therein And any person appointed for that purpose by resolution of the Council may as attorney of any such dissenting Members or Member execute any such deed or sign any such document or do any other act matter or thing which may be necessary or in the unfettered opinion of the Council requisite for giving effect to any such resolution.

Power of attorney to act for dissenting members.

Protection to purchasers.

39. No purchaser mortgagee lessee or other person whatsoever dealing with the Charity or any official thereof or with the property of the Charity shall be concerned or entitled to inquire into the validity propriety or regularity of any resolution or special resolution of the Council but shall be entitled to accept as conclusive evidence of the validity and efficacy thereof a copy of any purported resolution or special resolution purporting to be certified by the Warden as a true copy thereof.

Minute books and accounts.

40. A minute book and all proper books of account shall be provided and kept by the person appointed by the Council for that purpose. All proper accounts in relation to the Trust shall in each year be made out and certified by the accountants to the Charity.

Banking account.

41. A banking account or banking accounts for the purposes of the Trust shall be opened and kept at a proper bank to be from time to time selected by the Council and every sum of money received on account of the Trust shall forthwith be paid in to the credit of the appropriate account.

Members interested not to vote.

42. If any Member of the Council (including the Founder) is interested directly or indirectly in any transaction or proposed transaction or other matter before the Council he shall not vote thereon and if he shall vote his vote shall not be counted. In case of any inconsistency between this clause and clause 15 (1) hereof the provisions of this present clause shall prevail.

No remuneration to members of council.

43. Except as to any stipend or remuneration payable to any Member of the Council by virtue of his office as Warden or

other additional office no remuneration shall be payable to Members of the Council Provided that the Council may pay to such Members all reasonable and proper travelling expenses and other actual disbursements incurred by them in attending meetings of the Charity or otherwise in the strict and proper discharge of their duties as Members of the Council.

IN WITNESS whereof I have hereunto set my hand and seal the —— day of —— One thousand nine hundred and ——.

THE SCHEDULE ABOVE REFERRED TO.

(*Property subject to Trusts of this Deed.*)

Signed sealed and delivered by the above-named —— in the presence of }

Form 10.

Will of a Testator who is Not Making Provision for Dependants Entitled to the Benefit of the Inheritance (Family Provision) Act, 1938, with Reasons for the Testamentary Dispositions Made (*a*).

Drafted by B. A. Bicknell, of Lincoln's Inn.

I, A of *etc.* HEREBY REVOKE all testamentary dispositions heretofore made by me AND DECLARE this to be my last will.

1. *Appointment of executors and trustees.*

2. WHEREAS by a settlement dated the —— day of —— made

(*a*) This and the following form are taken from Brighouse's Short Forms of Wills (4th ed.), pp. 86-89. The Inheritance (Family Provision) Act, 1938, is considered *ante*, p. 121.

The Inheritance (Family Provision) Act, 1938, by s. 1 (1) provides that a surviving spouse and, in certain circumstances, surviving children may apply to the Court and, if the Court is of opinion that the will of a testator does not make reasonable provision for the maintenance of that dependant, the Court may order that such reasonable provision as the Court thinks fit shall, subject to such conditions or restrictions as the Court may impose, be made out of the testator's net estate for the maintenance of that dependant.

In drafting a will, therefore, which does not provide for the maintenance of a spouse or children who may claim to be dependants under

in contemplation of my marriage with my wife B certain stocks funds and securities were thereby settled for the benefit of my

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the Act, it is desirable to show on the face of the will that the exclusion of the dependant from benefiting is reasonable. It is to be observed that dependants are not entitled to a defined share of the testator's estate and he is not bound to make any provision for them. Should he make none, however, if applications under the Act, with resultant cost to the estate, are to be avoided it is advisable for the testator to state in writing the grounds on which he has excluded the dependant in question. The above form contains certain statements explaining such exclusion. These forms must be adapted to the actual circumstances of the case before the draftsman.

Sub-s. 6 of the Act indicates the matters which the Court will take into consideration in determining whether an order for maintenance shall be made. Sub-s. 6 provides: "The court shall, on any application made under this Act, have regard to any past, present or future capital or income from any source of the dependant of the testator to whom the application relates, to the conduct of that dependant in relation to the testator and otherwise, and to any other matter or thing which in the circumstances of the case the court may consider relevant or material in relation to that dependant, to the beneficiaries under the will, or otherwise."

The testator need not leave the Court to deduce his reasons for the provisions of his will from the circumstances of his life which may be brought to its notice after his death. Sub-s. 7 expressly authorises a testator to state in writing the reasons for his testamentary dispositions. This sub-section provides: "The court shall also, on any such application, have regard to the testator's reasons, so far as ascertainable, for making the dispositions made by his will, or for not making any provision or any further provision, as the case may be, for a dependant, and the court may accept such evidence of those reasons as it considers sufficient, including any statement in writing signed by the testator and dated, so, however, that in estimating the weight, if any, to be attached to any such statement the court shall have regard to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement."

In settling a statement justifying a will which makes no provision for dependants, the first question which the draftsman has to decide is whether the statement shall be in the will itself or whether advantage shall be taken of the provisions of sub-s. 7 and the statement be set out in a separate document. Generally, the better plan is for the will to contain the testator's reasons for his dispositions. It is only if such reasons are founded on some misconduct on the part of the dependant concerned that a separate statement should be made, or if the matters referred to are of a private character, which the testator does not wish to become public. Statements of a libellous character should never be incorporated in a will.

The reasons which justify a testator in failing to provide for a dependant appear to be capable of classification under three heads. The first is that the dependant is or has been otherwise provided for. It is to be observed that such provision need not have been made by the testator

said wife and the issue of our marriage NOW I HEREBY CONFIRM the said settlement AND DECLARE that I have not exercised or joined in the exercise of any of the powers of appointment thereby conferred upon me AND I FURTHER DECLARE that I am making no further provision for my said wife or for my children as they are well provided for by the said settlement;

[*or*] I HEREBY DECLARE that I am not making any provision for my wife B as she has been amply provided for by the will of Z and I consider that the small estate of which I am possessed can best be employed in making some provision for our grandchild X who by reason of the death of his parents cannot be properly maintained and educated without my assistance;

[*or*] (*b*) I abstain from making further provision for my wife B for the reasons set out in the written statement signed by me and bearing even date with this my will;

[*or*] I HEREBY DECLARE that I am making no provision for my daughters C and D this is not owing to any lack of affection for them but it is because I am satisfied that they have already been well provided for by their mother;

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and need not be a provision existing at the date of the will. For instance, an unmarried daughter, who had received a capital advance to establish her in a business she had selected, could not complain, should the business fail, if other unmarried daughters were nevertheless provided for by the will to the exclusion of herself. Secondly, the conduct of the dependant may have been such as to relieve the testator of all obligations to the dependant. The most obvious example is a spouse guilty of such conduct as affords grounds for a divorce. An unmarried daughter also might be guilty of such conduct in relation to the testator as would relieve him from all duty towards her. A child under twenty-one or a child incapacitated by mental or physical disability would less easily forfeit a right to maintenance. The third ground on which a testator may refuse to provide for dependants is that the beneficiaries in the will have a greater moral claim to be maintained. In the case of very small estates, it may well be that the relation who in fact looks after the testator during his declining years has a greater claim to maintenance than a wife or unmarried daughters who have delegated their home duties and are successfully earning a living. There may be other grounds which justify the testamentary provisions. Whatever these are, they should be briefly indicated by the draftsman either in the will or in a separate document.

(*b*) If the testator's reasons are not expressly stated in the will, the fact that he has left a written memorandum explaining them should appear on the face of the will so that dependants may have notice that such a statement exists and consider it before beginning proceedings under the Act.

[*or*] I am making no provision for my daughter C because I have during my lifetime spent considerable sums in training her for her present profession [*or* occupation]. This has enabled her to earn her own living. I feel that what estate I have must go to X who has devoted many years of her life to looking after me and my wife and to running our home. I have spent no money on her training and at my death she will be too old to earn her own living;

[*or*] I abstain from making any provision for my daughter C who upwards of —— years ago left home and has since that date completely cut herself off from me and the rest of her family. Her conduct has made it clear that she has repudiated all ties between us and I feel she has relieved me of all parental obligations towards her and that I can properly leave my estate to my other children;

[*or*] I abstain from making any provision for my children. They have for many years been earning their own livings and I have lived with my niece X who has looked after me for upwards of —— years and nursed me. I have not been able to pay her adequately and I feel any property I may have at my death should go to her as some return for all she has done for me.

3. I DEVISE AND BEQUEATH all the real and personal property whatsoever and wheresoever to which I may be entitled or over which I may have any disposing power at the time of my death unto my trustees UPON TRUST to sell and call in the same and out of the proceeds of such sale and calling in and out of my ready money to pay my funeral and testamentary expenses and debts and to stand possessed of the residue of the said moneys UPON TRUST for X absolutely.

IN WITNESS *etc.*

Form 11.

Statement in Writing by a Testator under Section 1 (7) of the Inheritance (Family Provision) Act, 1938, Explaining the Reasons for His Testamentary Dispositions (*a*).

Drafted by B. A. Bicknell, of Lincoln's Inn.

I, A of *etc.* HEREBY DECLARE that this is the statement referred to in my will bearing even date herewith. I have made no further provision for the maintenance of my wife B as she has given to me good grounds for divorcing her [by reason of her misconduct with Y at —— (*b*)]. I consulted my solicitors Messrs. —— of —— on or about the —— day of —— with regard to such divorce and all the evidence (*c*) I have in this matter is in their custody;

[*or*] I have made no further provision for my wife B as she left me on or about the —— day of —— 19—— without just cause and I consider that the persons with whom she is now living in total disregard of my wishes must maintain her;

[*or*] I have made no further provisions for my daughter C as she has left me. She has habitually disregarded my wishes and associated with persons of whom I cannot approve. I have repeatedly remonstrated with her and have made every effort to induce her to alter her manner of life. I have paid consider-

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(*a*) Sub-s. 7 requires that any statement in writing by the testator shall be both signed and dated.

Any statements made to a solicitor for the preparation of a written statement under sub-s. 7 would be privileged. The publication of the statement itself after the testator's death by his personal representatives to dependants, beneficiaries or their advisers, would be privileged so far as such publication was necessary to enable the persons interested to support or attack the testator's testamentary dispositions.

(*b*) It is not essential to give details of the misconduct on which the testator relies.

(*c*) It is not necessary for the testator to set out in the statement all the facts which afford him grounds for divorce. Sub-s. 6 of s. 1 requires the Court to consider "the conduct of the dependant in relation to the testator". Such conduct would include conduct entitling him to a divorce and, if the testator indicates what evidence he has, it can be laid before the Court for its consideration should occasion require.

able sums to assist her in the difficulties into which her persistent extravagance has led her (particulars (*d*) of this expenditure is to be found with my papers in my bank). I am not prepared to do anything more for her as I consider my other children who have led dutiful and respectable lives have a prior claim on me.

Signed this —— day of ——.

Form 12.

Statement of Cash Price to be Made by Owner before Making any Hire-Purchase Agreement under the 1938 Act (*a*).

Drafted by Hannah Cross, of Lincoln's Inn.

I —— of *etc.* the Owner of a suite of furniture comprising one settee and two armchairs hereby give you notice pursuant to section 2 (1) of the Hire-Purchase Act 1938 that the said suite of furniture may be purchased by you for £—— in cash.

To —— of *etc.* (prospective Hirer).

Dated ——.

(Signed) ——.

(*d*) Sub-s. 6 is so widely worded that the Court will look at any relevant papers of the testator. If he has kept account of his expenditure on his children, this should be stated as a guide to the Court as to the evidence which it may properly require to assist it in determining whether additional maintenance should be ordered or not.

(*a*) This statement is necessary in all cases to which the Hire-Purchase Act applies unless the hirer has inspected the goods or like goods and at the time of his inspection tickets or labels were attached to or displayed with the goods clearly stating the cash price *or* the hirer selected the goods by reference to a catalogue, price-list or advertisement which clearly stated the cash price: s. 2 (1).

In both these cases, it is sufficient compliance with the Act to state the cash price of *either* the goods as a whole, or of the different articles or sets of articles comprised therein. A similar statement should be made before making any credit sale agreement where the total purchase price exceeds £5: s. 3 (1).

Only written statements satisfy these two sections.

Form 13.

Notice to Hirer Excluding Implied Condition as to Fitness for a Particular Purpose (*a*).

Drafted by Hannah Cross, of Lincoln's Inn.

I —— of *etc.* the Owner of a —— hereby give you notice as follows:—

(1) Section 8 (2) of the Hire-Purchase Act 1938 declares that "Where the hirer expressly or by implication makes known the particular purpose for which the goods are required, there shall be an implied condition that the goods shall be reasonably fit for such purpose".

(2) The Hire-Purchase Agreement proposed to be made between you and me contains a provision excluding the condition implied by that section of the Hire-Purchase Act.

(3) The effect of the provision is that there will be no implied condition that the goods are reasonably fit for your purpose.

To —— of *etc.* (prospective Hirer).

Dated ——.

(Signed) ——.

NOTE.—When you have received and understood this notice, please sign the annexed receipt and return the same to me.

DETACHABLE RECEIPT TO BE ANNEXED.

I have received and understood a notice from you explaining that there will be no *guarantee* that the goods are reasonably fit for my purpose.

(Signed) ——.

(*a*) Sub-s. 3 of s. 8 of the Hire-Purchase Act, 1938, provides (*inter alia*) that the owner shall not be entitled to rely on any provision in the agreement excluding or modifying the condition set out in s. 8 (2) "unless he proves that before the agreement was made the provision was brought to the notice of the hirer and its effect made clear to him". It is submitted that the use of the forms provided above will afford the owner the requisite proof.

The owner should keep a copy of the notice. If the note is used, it will be essential to obtain a receipt. Where the receipt has not been obtained, a fresh notice omitting the note should be delivered.

Form 14.

Agreement to be Used for Hire-Purchase Transactions within the Hire-Purchase Act, 1938 (*a*).

Drafted by Hannah Cross, of Lincoln's Inn.

AGREEMENT FOR HIRE WITH OPTION TO PURCHASE made the —— day of —— 19— BETWEEN THE —— COMPANY whose registered office is situate at —— in the county of —— (hereinafter called "the Owners") of the one part and —— of —— in the county of —— (hereinafter called "the Hirer") of the other part.

WHEREAS (*b*):

The Owners have stated in writing to the Hirer (as the Hirer hereby acknowledges) that the cash price of the goods comprised in this agreement is £——.

[*Or*] The Hirer (as the Hirer hereby acknowledges) has inspected the goods comprised in this agreement or like goods and at the time of his inspection tickets or labels were attached to or displayed with the said goods clearly stating the cash

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(*a*) This form is designed to cover cases within the Hire-Purchase Act, 1938; that is to say, hire-purchase agreements and credit-sale agreements where the hire-purchase price or total purchase price, as the case may be, does not exceed:—

(1) where the agreement relates to a motor vehicle or railway wagon or other railway rolling stock, the sum of fifty pounds,

(2) where the agreement relates to livestock, the sum of five hundred pounds, and

(3) in any other case, the sum of one hundred pounds.

The Act comes into force on January 1, 1939, and extends to England and Wales only.

(*b*) Except in the cases referred to immediately below the owner must, before entering into the agreement, state the cash price in writing to the prospective hirer.

The owner should retain a copy of his statement and, when possible, get the hirer to sign the retained copy.

The alternative forms drafted above require the hirer to acknowledge that he has inspected the priced goods or selected goods from a priced catalogue, and should be sufficient evidence of compliance with s. 2. But it may be found safer to send the preliminary statement in all cases. It is not necessary to state the cash price of the different articles if the price of the whole set has been given. Therefore the phrase in square brackets can be deleted in each clause unless the phrase preceding the square brackets is struck out.

price of the said goods [*or*, all the different articles or sets of articles comprised in this agreement].

[*Or*] The Hirer (as the Hirer hereby acknowledges) has selected the goods comprised in this agreement by reference to a catalogue [price list] [advertisement] which clearly stated the cash price of the said goods [all the different articles or sets of articles comprised in this agreement].

Now in consideration of the hire rent hereinafter reserved and of the provisions and stipulations herein contained IT IS HEREBY AGREED between the parties hereto as follows:

1. The Owners hereby agree to let on hire to the Hirer and the Hirer hereby agrees to take on hire from the Owners all that suite of furniture more particularly described in the Schedule hereto (hereinafter called "the said goods") for a term of —— years from the date hereof subject to determination as hereinafter provided.

2. The Owners hereby grant to the Hirer an option to purchase the said goods upon the terms and conditions hereinafter set out.

3. (i) The hire-purchase price of the said goods is £—— (*c*).

(ii) The cash price of the said goods is £——.

(iii) [The said goods are let as second-hand goods (*d*)].

(iv) The amount of each instalment of the hire-purchase price payable by the Hirer is —— shillings.

(v) An instalment of the hire-purchase price is payable by the Hirer upon the first day of each month the first of such

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(*c*) Where the agreement requires the owner to effect any installation of the goods, the amount to be paid in respect of the installation should be specified, so that the owner may obtain the benefits afforded by s. 19. (See Note to Form 19 giving Notice of Installation Expenses.) In such cases clause 3 (i) will read: "The hire-purchase price of the said goods is £—— of which £—— is in respect of installation expenses. The Owner shall carry out the installation of the said goods."

Clause 3 (ii) will read: "The cash price of the said goods is £—— and of the installation thereof £—— making a total of £——."

(*d*) There is an implied condition (s. 8 (1) (d)) that the goods are of "merchantable quality" except where the goods are let as second-hand goods *and* the agreement contains a statement to that effect.

monthly instalments to be made upon the 1st —— 19— and so on month by month until —— has been paid or this agreement terminated in manner hereinafter appearing (*e*).

4. The Hirer agrees:

(a) Punctually to pay to the Owners without previous demand the instalments of the said hire-purchase price on the dates and to the amounts herein set out.

(b) At all times during the hiring to take proper care of the said goods and to keep the same in good condition and repair fair wear and tear alone excepted and so often as shall be necessary to cause the same to be repaired and cleaned in a proper and workmanlike manner by competent workmen.

(c) To keep the said goods always insured in the joint names of the Owners and the Hirer in their full value during the whole currency of the hiring in some respectable insurance office the selection whereof is to be subject to the approval of the Owners if they shall so require under a policy covering all usual risks of loss or damage to the said goods or any part thereof by theft or by fire the said policy to be submitted to the Owners and approved by them if they shall so require (so however that non-inspection by the Owners of such policy shall not have the effect of relieving the Hirer from any of his obligations hereunder with respect to the terms of the said policy) and punctually to pay the premiums on the said policy and to deliver receipts to the Owners for such payments if they shall so require and to comply with all conditions and do all other things necessary to keep such policy in full force. Provided that any sums paid by the insurers in respect of the risk assured shall be paid in the first instance to the Owners whose receipt shall be (and the policy shall so provide) the sole valid discharge for the same and the moneys so received may be applied by the Owners without prejudice to any other remedy hereunder towards the payment of any sums then due from the Hirer to

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(*e*) The note or memorandum must contain the statements provided for in this clause: s. 2 (2) (b). The Court has power, subject to any conditions that it thinks fit to impose, to dispense with some of the requirements if the hirer has not been prejudiced and it would be just and equitable to do so.

the Owners and the Owners shall apply the residue (if any) towards reinstating as nearly as practicable or in their absolute discretion in repairing the said goods in respect of the loss or damage to which the insurers shall have paid but nothing in this sub-clause shall operate to relieve the Hirer of any obligations under sub-clause (b) of this clause.

(d) Not to make any alteration to the said goods without the Owners' written consent first had and obtained.

(e) Not to assign or part with the benefit of this agreement or any interest therein except with the Owners' written permission and not to pledge the said goods or any part thereof and not to charge or purport to charge the said goods or create any incumbrance or purport so to do upon the said goods and not to suffer any lien to arise upon the same other than an ordinary repairer's lien for a reasonable time in respect of work done exclusively upon the said goods.

(f) Not to part with possession of the said goods or any part thereof during the hiring except for purposes of repair and subject to sub-clause (e).

(g) If the Hirer desires to remove the said goods to a new address to give notice in writing of his intention before removing the same and to specify the new address at which the said goods will be kept.

(h) To pay punctually all rent rates taxes and other outgoings payable in respect of any premises belonging to the Hirer upon which the said goods are at any time allowed to be and upon demand to produce all current receipts for such payments.

(i) In case the said goods shall have been taken at any time during the currency of this agreement out of the possession of the Hirer against his will or shall have been seized or impounded by way of execution or distress by order of any Court to give immediate notice of the same to the Owners and to take all reasonable and practicable steps to protect the Owners' interests but the taking of any such steps by the Hirer whether at the request of the Owners or not shall not prejudice any other rights of the Owners hereunder.

(j) To permit the Owners or their agent at all reasonable

times to have access to the said goods to inspect and examine the condition of the same.

5. The Hirer is deemed to have had inspection of the said goods before signing this agreement and no warranty or condition (other than the conditions and warranties incorporated herein by sub-section (1) of section 8 of the Hire-Purchase Act 1938 (*f*)) is given or implied by the Owners as to condition state of repair quality or fitness for any purpose of the said goods and the condition if any implied by section 8 (2) of the Hire-Purchase Act 1938 is hereby excluded. Any description of the same put forward by the Owners shall be deemed to be for the purpose of identification only and shall not constitute or import any warranty of its accuracy and the Owners shall not be responsible for any injury or damage howsoever arising from the user of the said goods. The Owners before the date of this agreement gave written notice to the Hirer of the provisions contained in this Clause and made their effect clear to him.

6. For the further assurance of the due payment of any sums due from the Hirer hereunder and without prejudice to any rights of the Owners the Hirer shall if required to do so at any time by the Owners procure a joint and several guarantee to be executed by not more than three respectable and responsible persons in a form to be approved by the Owners to secure the due payment of such moneys to the Owners and if the Hirer shall fail or neglect to procure the giving of such guarantee to the reasonable satisfaction of the Owners the Owners shall be entitled to terminate the hiring and (provided that not more than £—— (*g*) has been paid by the Hirer hereunder) to retake the said goods.

7. The Hirer strictly performing the terms and conditions

(*f*) Such warranties and conditions cannot be excluded. The implied condition as to fitness for a known purpose (s. 8 (2)) can be excluded if the hirer has been told, before entering into the agreement, that it will be excluded. See Form 13, *ante*, and Hire-Purchase Act, s. 8 (3).

(*g*) The sum to be inserted here will be one-third of the hire-purchase price, *i.e.*, the maximum allowed by s. 11. Where there have been installation expenses, the one-third may be increased by the amounts permitted under s. 19.

of this agreement on his part to be observed and performed throughout the hiring and being in no way in default under this agreement shall be entitled upon paying the difference between the sum already paid by way of instalments of the hire-purchase price and the total hire-purchase price hereof together with any sums which may then be due from the Hirer otherwise than by way of instalments of the hire-purchase price to exercise his option hereinbefore mentioned to purchase the said goods but until and unless the Hirer shall exercise such option the said goods shall be and remain the absolute property of the Owners and the Hirer a mere bailee thereof.

8. If the Hirer shall have knowingly made any false statement or shall have withheld any material information in order to induce the Owners to enter into this agreement or if at any time during the hiring the Hirer shall:

(a) fail to observe or perform any of the conditions and obligations contained in Clause 4 hereof or

(b) shall suffer an order to be made against him under section 5 of the Debtors Act 1869 not being such an order as is provided for by section 107 of the Bankruptcy Act 1914

then in any of the said events and from time to time so often as any of them shall happen (notwithstanding that the Owners may have waived some previous breach or default of the like nature) the Owners shall be entitled at any time while the hiring subsists forthwith to give notice determining the hiring and thereafter and provided that not more than £—— (*g*) has been paid by the Hirer hereunder to retake possession (*h*) of the said goods.

9. If the Hirer at any time during the hiring shall:

(1) suffer any execution or distraint by order of any Court whereby any goods belonging to him shall be seized or

(2) having the intention or being about to commit any

(*h*) *As to retaking goods.* Any provision *authorising* an owner to enter for the purpose of retaking possession is, under s. 5 (a), void. But entry without licence is presumably still possible, although the extent of such a right has never been satisfactorily determined.

act of bankruptcy shall commit any act or make any omission preliminary to committing an act of bankruptcy

then upon the happening of any such event the hiring hereby created shall immediately and automatically cease.

10. Immediately upon the cesser of the hiring whether pursuant to clauses 8 or 9 hereof the said goods shall cease to be in the possession of the Hirer with the consent and permission of the Owners but such determination of the hiring shall not affect or prejudice any of the Owners' rights under this agreement or affect any claim by the Owners for damages.

11. If at any time during the subsistence of this agreement the lessor (if any) of the Hirer whether immediate or superior of any premises wherein the said goods are at the time kept shall either give authority to a bailiff to levy a distress for arrears of rent due out of such premises or shall himself enter such premises for the purpose of levying a distress then immediately upon the giving of such authority or upon such entry of the premises as aforesaid this agreement shall automatically terminate and the Hirer shall be deemed to be no longer in possession of the said goods pursuant to this agreement and the consent of the Owners to the Hirer's possession of the same shall thereupon cease and the Owners shall be deemed to have requested the Hirer to surrender the said goods Provided always that such termination of the agreement shall be without prejudice to any already existing liability on the part of the Hirer and to his liability under clause 15 hereof and shall not entitle the Hirer to the return of any moneys already paid by him (*i*).

(*i*) The object of this clause is to prevent the landlord from distraining upon the owner's goods. If goods are "comprised in a hire-purchase agreement" they are not protected from distress by the Law of Distress (Amendment) Act, 1908. But, if the agreement is terminated, the goods cease to be "comprised" therein, and become goods of the owner in respect of which he can serve a declaration under s. 1, Law of Distress (Amendment) Act, 1908, and thus be protected against the landlord. The termination is made automatic, because termination on notice cannot usually be made in time to avoid the distraint.

But there is a further difficulty. It was held in *Times Furnishing Co., Ltd.* v. *Hutchings*, [1938] 1 K. B. 775, that a provision that "this Agreement and the Company's consent to the hirer's possession of the

12. If at any time subsequent to the determination of this agreement as provided in clause 11 hereof the Hirer shall make any payment to the Owners purporting to be a payment due under this agreement it is hereby declared that the making of such payment shall be regarded as an offer by the Hirer to make a new contract but such offer shall not be deemed to have been accepted by the Owners so as to make a binding agreement by reason only that the Owners shall have omitted for a reasonable time to return such payment or shall have sent a formal acknowledgment of its safe receipt.

13. Any relaxation forbearance or indulgence by the Owners in respect of the non-performance by the Hirer of any of his obligations hereunder shall not estop or preclude the Owners from at any future time pursuing all or any of the remedies available to them for that breach or any future similar breaches and shall not constitute any modification or waiver of the terms

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furniture comprised therein shall automatically determine and come to an end", upon the happening of certain prescribed events does not operate automatically to determine the company's consent, and that the goods remain "in the possession order or disposition of the tenant under such circumstances that such tenant is the reputed owner thereof". Humphreys, J., in that case indicated that "where goods have been in the possession order or disposition of another party by the consent and permission of the true owner and the true owner seeks to establish that he has retracted that consent and permission, he must show that he has taken some steps to indicate his intention and probably that he has taken some steps to recover the goods". To give effect to this recommendation a form of notice withdrawing consent has been drafted and appears in this issue. But the landlord may have levied the distress before the owner has had an opportunity to serve such a notice. Therefore in the clause above, the author has made another attempt to effect an automatic cesser of consent by providing that "the owner shall be deemed to have requested the hirer to surrender the goods". It is worth noting that in many cases after January 1, 1939, the owner will be unable to go in and recover the goods and that he will therefore have to leave the goods in the hirer's possession.

It remains to be seen whether the Courts will hold that the phrase indicated above does operate to withdraw consent.

This difficulty about reputed ownership will not always arise, because in many cases it will be possible to prove a custom (a) that the hirer has the goods of others in his possession for the purposes of his trade, (b) that persons of the hirer's class generally have such goods on hire-purchase. In such circumstances, the goods are not in the hirer's "possession order or disposition" under such circumstances that the tenant is the reputed owner thereof.

of this agreement creating such obligations and in general shall not in any way prejudice the rights of the Owners hereunder.

14 (a) Any notice or demand by the Owners to the Hirer shall be sufficiently given if sent in writing by post or otherwise to the Hirer's address herein set out or to any other address which the Hirer in any communication to the Owners purports to have and shall be deemed to have been given at the time at which it would have been received in the ordinary course of post if sent by post and if sent otherwise at the time it was actually delivered at such address.

(b) All payments of money due under this agreement shall be made direct to the Owners and no other person shall be deemed to have authority to accept payment on behalf of the Owners unless the Owners give notice in writing to the Hirer to that effect.

15. If the Owners shall at any time in exercise of any power in that behalf herein or by any Act of Parliament contained terminate the hiring or if the hiring hereby created shall automatically cease, the Hirer shall pay (without prejudice to any other liability which may have accrued before termination) any instalments which are in arrear at the date of the termination. If when the Hirer has paid those instalments the total amount which he has paid under this agreement in respect of the hire-purchase price is less than £—— (*k*) he must also pay enough to make up that sum.

16. The terms of the notice hereinafter set out shall be part of this agreement.

NOTICE (*l*).

Right of Hirer to terminate Agreement.

(i) The Hirer may put an end to this agreement by giving

(*k*) Stating a sum equal to one-half of the total hire-purchase price (s. 4), if there are no installation charges; or, if there are installation charges specified in the agreement, stating an amount calculated under s. 19. The liability on the hirer who terminates may not be made greater than the liability created here, see s. 5 (b). Nor can any additional liability be put on the hirer where the owner terminates: see s. 5 (c).

(*l*) This notice is an essential part of the agreement, and must be at least as prominent as the rest of the contents of the agreement: s. 2 (2) (c).

notice of termination in writing to any person who is entitled to collect or receive the hire rent.

(ii) He must then pay any instalments which are in arrear at the time when he gives notice. If, when he has paid those instalments, the total amount which he has paid under the agreement is less than £—— (*k*) he must also pay enough to make up that sum.

(iii) If the goods have been damaged owing to the Hirer having failed to take reasonable care of them, the Owners may sue him for the amount of the damage unless that amount can be agreed between the Hirer and the Owners.

(iv) The Hirer should see whether this agreement contains provisions allowing him to put an end to the agreement on terms more favourable to him than those just mentioned. If it does, he may put an end to the agreement on those terms.

Restriction of Owners' right to recover goods.

(1) After £—— (*m*) has been paid then unless the Hirer has himself put an end to the agreement the Owners of the goods cannot take them back from the Hirer without the Hirer's consent unless the Owners obtain an order of the Court.

(2) If the Owners apply to the Court for such an order, the Court may, if the Court thinks it just to do so, allow the Hirer to keep either:

(a) the whole of the goods, on condition that the Hirer pays the balance of the price in the manner ordered by the Court; or

(b) a fair proportion of the goods having regard to what the Hirer has already paid.

As Witness *etc.*

The Schedule above referred to.

[*Identification marks, inventory, etc.*]

[*Signatures of parties*] (*n*).

(*m*) Stating a sum equal to one-third of the total hire-purchase price (s. 11); or, if there are installation charges specified in the agreement, stating a sum calculated under s. 19.

(*n*) The agreement must be signed by the hirer and by, or on behalf of, all other parties thereto: s. 2 (2) (a). Note that the hirer must sign

Form 15.

Statement of Position to be Made by Owner after Request from Hirer (*a*).

Drafted by Hannah Cross, of Lincoln's Inn.

I —— of *etc.* the Owner of —— in pursuance of the duty imposed upon me by section 6 (1) of the Hire-Purchase Act 1938 hereby state that:—

(1) The amount paid by you or on your behalf under the agreement dated the —— made between you and me is £——

(2) (a) The amount which has become due under the said agreement but remains unpaid is £——

(b) An unpaid instalment amounting to £—— became due on each of the following dates namely:—

the 1st March 19—

the 1st April 19—

the 1st May 19—

(3) (a) The amount which is to become payable under the said agreement is £——

(b) An instalment of —— shillings will become payable on the 1st of —— and a further instalment of —— shillings will

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personally, although the other parties may sign by an agent. See on this Pt. III of the Article, *ante*, p. 128. A copy of the agreement must be delivered or sent to the hirer within seven days of the making of the agreement. This provision may be dispensed with on the terms and in the circumstances set out in s. 2 (2).

(*a*) A copy of the memorandum or note of the agreement must be sent with this statement. If a hirer, at any time before the final payment has been made, delivers a request in writing together with one shilling for expenses, the owner must within four days of receipt of the request send a signed statement covering the points referred to in this form: s. 6 (1), Hire-Purchase Act, 1938. The section does not prescribe the form of "request", therefore it is suggested that an owner should treat any request which is accompanied by the shilling as a sufficient request for the purposes of the section.

Failure to send the proper information, without reasonable excuse, prevents the agreement from being enforced against the hirer (or any contract of guarantee from being enforced against the guarantor) while the default continues. Furthermore, if the default continues for a month, the defaulter becomes liable on summary conviction to a fine not exceeding £10: s. 6 (2). See also *ante*, p. 130. The section and the form cover credit sales as well as hire-purchase agreements.

become payable on the 1st day of each succeeding month until —— instalments have been paid.

To —— of *etc.* (Hirer).

Dated ——.

(Signed) —— (Owner).

Form 16.

Request by Owner for Information as to Whereabouts of Goods (*a*).

Drafted by Hannah Cross, of Lincoln's Inn.

I —— of *etc.* Owner of a —— wireless set comprised in an agreement dated the —— made between us hereby request you to inform me within fourteen days of receipt of this request where the —— wireless set is at the time when the information is given or posted.

To —— of *etc.* (Hirer).

Dated ——.

(Signed) ——.

Form 17.

Notice by Owner to Hirer Withdrawing his Consent to Possession by the Hirer (*b*).

Drafted by Hannah Cross, of Lincoln's Inn.

I —— of *etc.* Owner of a suite of furniture formerly comprised in an agreement dated the —— made between us,

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(*a*) S. 7 of the Hire-Purchase Act, 1938, provides that a hirer who is bound by his agreement to keep the goods comprised therein in his possession or control, shall, on receipt of a request in writing from the owner, inform the owner where the goods are at the time when the information is given or, if it is sent by post, at the time of posting.

The section does not appear of much value. A defaulting hirer becomes liable to a fine up to £10, but there is nothing in the Act to prevent him from moving the goods any time after posting his letter.

(*b*) Under the Law of Distress (Amendment) Act, 1908, goods which are either "comprised in a hire-purchase agreement" or are "in the

which agreement has since terminated, hereby give you notice that the said goods are no longer in your possession order or disposition with my consent or permission.

To —— of *etc.* (formerly Hirer).

Dated ——.

(Signed) ——.

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possession order or disposition" of a tenant, may be taken by the landlord when he distrains.

So far as goods "comprised in a hire-purchase agreement" are concerned, the owner can protect himself by providing that the agreement shall *ipso facto* terminate if the landlord takes any step to levy a distress. The result of such termination is that the goods are no longer "comprised in a hire-purchase agreement". (After such termination, the owner need only serve the landlord or his agent with the declaration prescribed by s. 1 of the Law of Distress (Amendment) Act, 1908, to acquire full protection).

But, the clause providing for an *ipso facto* termination of the agreement is apparently not enough to take the goods out of the "possession order or disposition" of the tenant or hirer: *Times Furnishing Co.* v. *Hutchings*, [1938] 1 K. B. 775. Therefore, an owner who desires to protect his goods from the landlord must take some step to withdraw his consent to the hirer's possession.

It is suggested that he should serve a notice on the hirer in the form indicated above, and where possible should also serve the landlord with an appropriately worded version of this notice. Time and speed will be of the utmost importance.

This notice should also be used in cases under s. 16 (2) of the Hire-Purchase Act, 1938. Sub-s. 1 of that section provides that where the Court has postponed the operation of an order for specific delivery of goods, the goods shall not, during the postponement, be treated as goods which are by consent or permission of the owner in the hirer's possession. So far as that goes, the owner is protected. But, under sub-s. 2 of s. 16, where the hire-purchase agreement has been determined or where the owner has commenced an action for recovery of the goods, the owner does not get a similar protection against a distress by the landlord. That is to say—although the sub-section declares that, in such circumstances, the goods shall not be treated as goods comprised in the hire-purchase agreement, it leaves it open to argument that the goods are still by consent of the owner in the hirer's possession. The above notice is designed as an answer to that argument. For further discussion see *ante*, pp. 134-5.

Form 18.

Request by Owner to Hirer to Surrender Goods (*a*).

Drafted by Hannah Cross, of Lincoln's Inn.

I —— of *etc.* the Owner of a suite of furniture comprised in a hire-purchase agreement dated the —— made between you and me hereby request you to surrender (*b*) the said goods at your address (*c*). And take notice that if you fail to surrender the said goods your possession of the said goods shall for the purposes of my claim to recover possession and by virtue of section 10 of the Hire-Purchase Act 1938 be deemed to be adverse to me (*d*).

To —— of *etc.* (the Hirer).

Dated ——.

(Signed) ——.

Form 19.

Notice to Hirer by Owner Specifying Installation Expenses (*a*).

Drafted by Hannah Cross, of Lincoln's Inn.

I —— of *etc.* the Owner of a —— refrigerator hereby give you notice pursuant to section 20 (2) of the Hire-Purchase Act

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(*a*) For the effect of s. 10 of the Hire-Purchase Act, 1938, see *ante*, p. 134. There is no prescribed time limit within which the hirer must comply with this request. Presumably an owner should allow "reasonable" time before commencing an action, unless he has received an express refusal to surrender.

(*b*) To require the hirer to pack the goods or to deliver them elsewhere would be to impose on him a liability greater than that contemplated by the Act. By s. 5 (b) Hire-Purchase Act, 1938, any provision, arising on termination of an agreement, creating any liability in addition to the liability imposed by the Act, is void.

(*c*) The owner, in certain cases, can by virtue of s. 7 Hire-Purchase Act, 1938, ask for information as to the whereabouts of the goods: see Form 16, *ante*. He will then know where the surrender can take effect.

(*d*) This form should only be used when the right to recover possession has accrued.

(*a*) This applies only to hire-purchase agreements made *before* the Act. The sum inserted here must not exceed the expense actually incurred by

1938 that the hire-purchase price of the said refrigerator comprised in the hire-purchase agreement dated the —— made between you and me includes a sum of £—— in respect of the installation of the said refrigerator carried out by me.

To —— of *etc.* (Hirer).

Dated ——.

(Signed) ——.

Form 20.

Reconveyance by Indorsement of Mortgaged Property to a Mortgagor by the Executors of a Mortgagee who has by Will released the Mortgage Debt (*a*).

Drafted by the General Editor.

THIS RECONVEYANCE made the —— day of —— BETWEEN A of *etc.* and B of *etc.* (hereinafter called "the Executors")

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the owner in respect of the installation. The point of the notice is to enable owners under hire-purchase agreements made *before* the Act to obtain some of the benefits conferred by s. 19 on owners under agreements made after the Act. Briefly, the effect of s. 20 is to raise the limit of one-third (above which owners can only recover possession of their goods by action: s. 11). A practical example will probably clarify the matter. Suppose the total hire-purchase price of a refrigerator was £18, of which £3 was attributable to the expenses of installation. Without s. 20, so soon as the hirer has paid £6 (= one-third) the owner could recover possession only by action. Thanks to s. 20, the statutory one-third may be calculated as follows: The installation expense (£3) is deducted from the hire-purchase price (£18), result £15; then that £15 is divided into thirds, result £5; then the installation expense (£3) is added to the actual third (£5) to form the statutory third for the purposes of the section. The practical result is that the owner's right to recover possession without resorting to the Courts is extended until £8 has been paid. As he cannot recover the expenses of installation the above provision seems only proper. It should be noted that the owner who desires to obtain the benefits of the section must serve a notice on the hirer and must wait twenty-eight days before acting thereunder.

(*a*) Stamp 6d. per cent. *ad valorem*. It is doubtful whether an executor would be justified in signing the usual form of vacating receipt as he has not in fact received the mortgage debt from the mortgagor. Actually a purchaser from the mortgagor would not be entitled to inquire whether the mortgage money was in fact repaid by the mortgagor, as without notice he could not go behind the vacating receipt. The mortgagor must pay the legacy duty if the release is not free of duty.

of the one part and the within named C of *etc.* (hereinafter called "the Borrower") of the other part.

WHEREAS:

Recitals:

1. By his will dated the —— day of —— the within named E after appointing the Executors his executors and trustees and after certain bequests and devises not material to this deed released and forgave to the Borrower or to his representatives if he should die in the testator's lifetime the sum of £—— then due to him from the Borrower on mortgage of the within described property [of property at ——] or so much thereof as might remain owing to the testator at his death and all interest for the same and the testator directed that the property comprised in such mortgage should be surrendered *or,* released and reconveyed accordingly discharged from the said mortgage debt and interest and all claims in respect thereof [and free from all death duties]. of will;

2. [Under the provisions of the Law of Property Act 1925 the legal estate in fee simple assured by the within written mortgage has been converted into a legal term of 3,000 years from the first day of January 1926 subject to the like right of redemption.] for a mortgage prior to 1926;

3. The testator died on the —— day of —— without having revoked or altered his said will [except by a codicil not affecting this deed] and his said will [and codicil thereto] were duly proved by the executors in the Principal Probate Registry of the High Court of Justice on the —— day of ——. death of mortgagee and probate of his will;

4. The within mentioned sum of £—— remains owing to the Executors as such executors as aforesaid on the security of the within written mortgage but all interest for the same has been paid up to the death of the testator [*or as the case may be*] as the Executors hereby admit. of state of mortgage debt;

5. In consideration of the release of the said mortgage debt and interest in the said will contained the Executors have agreed at the request of the Borrower to release and surrender the said mortgaged premises to the Borrower in manner hereinafter appearing. of agreement to reconvey.

Reconveyance.

NOW THIS DEED WITNESSETH that in consideration of such release so directed to be made by the testator as aforesaid and of the premises the Executors as mortgagees hereby surrender UNTO the Borrower All the property and premises comprised in or assured by the within written mortgage or which are now by any means vested in the Executors as such mortgagees as aforesaid subject to redemption by virtue thereof To the intent that the term subsisting therein under the within written mortgage may cease and merge in the reversion immediately expectant thereon and that the said premises may henceforth be held by the Borrower discharged from the said sum of £—— and interest thereon and from all charges claims and demands whatsoever under or by virtue of the within written mortgage AND the Executors hereby acknowledge the right of the Borrower to production of the probate of the will of the within-named E. (the possession of which is retained by the Executors) and to delivery of copies thereof (*b*).

IN WITNESS *etc.*

Form 21.

Town and Country Planning: Agreement between Estate Owner and Planning Authority as to the User of Land (*a*) (*b*).

AN AGREEMENT made the —— day of —— 19— BETWEEN —— of —— (who and whose successor or successors in title

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(*b*) It will be convenient if this acknowledgment is given by the executors, but this cannot be insisted on as the case does not come within the scope of *Re Miller and Pickersgill's Contract*, [1931] 1 Ch. 511.

(*a*) This agreement was settled by T. J. Sophian, of the Inner Temple.

(*b*) S. 34 of the Town and Country Planning Act, 1932, enables agreements as to the user of land to be entered into between owners and planning authorities.

S. 34 provides:—

"(1) Where any person is willing to agree with any [local authority, county council, or responsible authority, not being a local authority or a county council] that his land, or any part thereof, shall, so far as his interest in the land enables him to bind it, be made subject, either permanently or for a specified period, to conditions restricting the planning, development, or use thereof in any manner in which those matters might be dealt with by or under a scheme, the authority may, if they think fit, enter into an agreement with him to that effect, and shall have power to

the owner or owners for the time being of the land comprised in this agreement are hereinafter called "the Estate Owner") of the one part and THE RURAL DISTRICT COUNCIL OF —— (who and whose successors are hereinafter called "the Council") of the other part

WHEREAS: Recitals:

1. The Estate owner is the owner in fee simple of the land and property situate in the Parish of —— in the Rural District of —— and which said land is delineated and shown on the plan annexed hereto and is thereon edged round with pink. of property affected;

2. The Council have prepared and adopted by resolution a planning scheme for the whole of the Council's area under the Town and Country Planning Act 1932 (hereinafter called "the Act") and the scheme and scheme map have been submitted to the Minister of Health for approval. of town planning resolution;

3. The land the subject of this agreement is zoned in the said scheme and scheme map for the erection of private residences only at a density of two houses per acre but the Estate Owner desires to use and develop the land for the purpose of digging and removing the sand therein and/or the manufacture of bricks and/or tiles thereon and/or any ancillary purposes thereto. of desire to alter scheme.

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enforce the agreement against persons deriving title under him in the like manner and to the like extent as if the authority were possessed of, or interested in, adjacent land and as if the agreement had been entered into for the benefit of that adjacent land."

In the case in question the land had been formerly used as a brick-works though work thereon had been suspended. The land was scheduled for the erection of private dwelling-houses at a density of two to the acre. It was felt, however, that this was not the best use to which the land could be put, since there were quantities of brick-making materials on the land which should first be utilised, a process which might take some years.

Agreement accordingly was reached with the authority that while the zoning provisions of the scheme with regard to the land in question should stand, permission should be given to the owner to use the land for brick-manufacturing purposes (a use which was contrary to the scheme) for a definite time, after the lapse of which the zoning provisions of the scheme would apply with full force to the land in question.

S. 34 accordingly may be found to be a useful means of effecting a compromise with planning authorities in cases where the user desired by the owner conflicts with the user sanctioned by the scheme. Such agreements should of course be made before the scheme becomes effective.

4. The Estate Owner and the Council have agreed to enter into the agreement hereinafter contained in pursuance of the powers contained in section 34 of the Act

Operative part :

NOW THIS DEED WITNESSETH and it is mutually agreed between the Estate Owner and the Council as follows:—

agreement made pursuant to s. 34 of Act;

1. This agreement is made pursuant to the provisions contained in section 34 of the Act and shall be deemed to form part of the said scheme and the provisions of this agreement shall prevail notwithstanding that the same may be inconsistent with the provisions of the said scheme.

to remain in force for twenty-five years;

2. This agreement shall remain in force for a period of twenty-five years from the date hereof but save in so far as the said scheme and map is modified by this agreement during the said period of twenty-five years the said scheme and map when approved by the Minister of Health and in particular the zoning of the said land for private residences at a density of two houses per acre shall remain in full force, without prejudice, however, to any right conferred on the Estate Owner by the said scheme, and in particular any rights under the said scheme whether by way of application to the Council or appeal to the Minister, or otherwise, *inter alia*, to procure any subsequent alteration or modification of any provision of the said scheme relating to the development and/or user of the said land.

permission to vary zoning;

3. Notwithstanding the zoning of the said land delineated and shown on the plan annexed hereto for the erection of private residences only at an average density of two houses per acre the Estate Owner shall during the period of this agreement be permitted to use and develop the said land for the purpose of digging and removing the sand therein and/or for the manufacture of bricks and/or tiles thereon and/or any ancillary purposes thereto.

plans to be approved;

4. During the period of this agreement no buildings or machinery for the manufacture of bricks and/or tiles shall be erected on the said land without detailed plans and elevations thereof being first submitted to the Council for their approval and the plans and elevations being approved by the Council in writing (such approval to be deemed to be given by the Council

unless notice of disapproval of the same is given in writing to the Estate Owner within [two] months of the submission of the same to the Council) and the Estate Owner shall also furnish to the Council all reasonable particulars relating to the erection of any such buildings or machinery. Any buildings which the Estate Owner desires to erect shall in any event comply in all respects with the byelaws with respect to new streets and buildings and all general statutory provisions in force for the time being in the Council's district.

liberty to appeal to Minister of Health;

5. In the event of the Council failing to approve any of the plans or elevations for the erection of buildings and machinery within two months of the same being submitted to them the Estate Owner shall be at liberty to appeal to the Minister of Health against the decision of the Council (except in the case of a refusal by the Council to approve any plan by reason of the fact that such plan does not comply with the building byelaws or with the general statutory provisions with regard to buildings in force in the district) and the decision of the Minister shall be final and binding on both parties.

power to claim compensation.

6. In the event of the Minister confirming the Council's refusal to approve any of the plans or elevations and the Estate Owner deciding by reason of such refusal not to proceed with the use and development of the said land for all or any of the purposes specified in paragraph 3 hereof the Estate Owner shall be entitled to claim and recover from the Council compensation for injurious affection and any other loss or damage he might suffer in consequence of thereby being prevented and/or rendered unable to use and develop the said land for all or any of the said purposes.

Arbitration clause.

7. In default of agreement the amount of such compensation shall be determined by an independent arbitrator to be agreed upon between the parties, or, failing agreement to be nominated by the President for the time being of the Chartered Surveyors Institution and the said arbitrator shall have the like powers with respect to procedure, costs and the statement of cases as an official arbitrator has under the Acquisition of Land (Assessment of Compensation) Act, 1919.

8. On the expiration of the period of this agreement the Estate Owner shall if required by the Council to do so remove any buildings or machinery that may have been placed on the land during the period of the agreement but without being entitled to claim any compensation for the removal of such buildings and machinery.

IN WITNESS whereof the Estate Owner has hereunto set his hand and seal and the Council has caused its Common Seal to be affixed the day and year first above written.

Form 22.

Will of a Married Man providing for his Wife and Children (Alternative Form) (*a*).

I, A of *etc.* hereby revoke all wills and codicils heretofore made by me AND DECLARE this to be my last will.

In case my wife B survives me for one month I appoint her to be sole executrix of this my will and I devise and bequeath all my property both real and personal to her.

In case my wife predeceases me or does not survive me for one month then I WILL AND DECLARE as follows:—

[*See vol.* 2, *p.* 416, *for rest of form.*]

(*a*) A correspondent has pointed out that the form of will of a married man (vol. 2, p. 416) does not provide for the case where the wife dies simultaneously with or immediately after her husband. As the form was originally drafted, if the wife survived the husband she took all his estate. The result of this might be, if she was killed in the same accident which killed her husband, surviving him by but a few hours, death duties would be twice payable, both on her death as well as his. This alternative form is suggested to meet this difficulty. It postpones the wife's absolute interest for a month. This period should be sufficient to enable her to make any testamentary provisions which may be necessary as the result of her becoming the absolute owner of the family property, and will also assure that should she be killed as the result of the same accident which kills her husband, death duties are only once payable. A similar form appears in Brighouse, Short Forms of Wills, 4th ed., p. 60, and the above alternative form may also be used with that form.

Form 23.

Lessee's Covenant to Observe Statutory Requirements, Execute Works Consequent on Such Requirements, and Indemnify Landlord against Expenses, etc. (*a*).

Drafted by Philip Fores, of the Inner Temple and Lincoln's Inn.

The Lessee for himself and his assigns hereby covenants with the Landlord . . . At all times during the said term to observe and comply in all respects with the provisions and requirements of any and every enactment (which expression in this covenant includes as well any and every Act of Parliament already or hereafter to be passed as any and every order regulation and by-law already or hereafter to be made under or in pursuance of any such Act) so far as they relate to or affect the said demised premises or any additions or improvements thereto or the user thereof for the purposes of any manufacture process trade or business or the employment or residence therein of any person or persons or any fixtures machinery plant or chattels for the time being affixed thereto or being thereupon or used for the purposes thereof and to execute all works and provide and maintain all arrangements which by or under any enactment or by any government department local authority or other public authority or duly authorised officer or Court of competent jurisdiction acting under or in pursuance of any enactment are or may be directed or required to be executed provided and maintained at any time during the said term upon or in respect of the said demised premises or any additions or improvements thereto or in respect of any such user thereof or employment or residence therein of any person or persons or fixtures machinery plant or chattels as aforesaid whether by the landlord or tenant thereof and to indemnify the Landlord at all times against all costs

(*a*) This form is reproduced by kind permission of Mr. B. A. Schooling, for whom it was prepared. For explanation, refer to article "Landlords' Liabilities under Some Recent Statutes", *ante*, p. 241.

charges and expenses of or incidental to the execution of any works or the provision or maintenance of any arrangements so directed or required as aforesaid and not at any time during the said term to do or omit or suffer to be done or omitted on or about the said demised premises [(*b*) or any part or parts used for the purposes of but not comprised in the said demised premises of the building and premises of which the said demised premises form part] any act or thing by reason of which the Landlord may under any enactment incur or have imposed upon him or become liable to pay any penalty damages compensation costs charges or expenses: PROVIDED ALWAYS that notwithstanding the foregoing covenants [*here insert any proviso for limiting the rigour of the covenant, as, e.g.,* the Lessee shall not be required to pay more than one quarter of the expenses of or incidental to the provision of new or improved means of escape from the said demised premises in case of fire].

Form 24.

Three Forms to Meet some of the Provisions of the Coal Act, 1938.

Drafted by Hannah Cross, Barrister-at-Law.

Form A.

Clause to be inserted in a Contract for Sale of Land and in a Conveyance (*a*).

[IN CONTRACT.] The property is sold and will be conveyed [IN CONVEYANCE.] Subject if and so far as any coal or

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(*b*) The words in brackets should be included only on a demise of *part* of a building; see Factories Act, 1937, s. 102.

(*a*) This form is intended for cases where the existence of coal under the land is suspected only or where the coal, though known to exist, is not immediately workable or likely to become workable for some years and is therefore of no present value. In every such case this clause should be inserted in the contract and conveyance because, as from January 1, 1939, the landowner is deemed to have entered into a contract for the sale of all coal and mines of coal (together with, among other rights, a right to withdraw support) to the Coal Commission: see Coal Act, 1938, s. 3.

(If the coal has a present value, it will, of course, be the subject-matter of a particular reservation (or disposition), for which see below, Form (C).)

mines of coal (*b*) as defined by the Coal Act 1938 may exist under the property to all estates and interests in such coal or mines of coal and all ancillary property and rights (including rights to withdraw support) which by virtue of the said Act may now be or may hereafter become vested in the Coal Commission or their lessees or other persons deriving title under them.

Form of Requisition to be used by Purchaser. Form B.

Is there any coal or mine of coal (*b*) as defined by the Coal Act 1938 under the property?

Form (*c*) **of Reservation of Mines and Minerals in a Conveyance made after January 1, 1939** (*d*). Form C.

Except and reserving unto the Owner in fee simple FIRST ALL coal and mines of coal (*e*) within or under the scheduled lands and all such other property and rights in respect of or in relation to the said lands as are to be acquired by the Coal Commission under the provisions of the Coal Act 1938 and also reserving unto the Owner for the purposes of any lease or tenancy which may be granted by the Owner under the provisions of the said Act in respect of the said coal and mines of coal or any part

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In the cases supposed above, it is improbable that any claim for compensation could be made, but it is possible that at some future date the Coal Commission might work the coal and exercise their right to withdraw support. The existence of coal presently unworkable therefore is, or may be, depreciatory. That being so, it is advisable to provide in the contract or conveyance that the purchaser shall take the land subject, so far as there may be coal under it, to the rights of the Commission.

(*b*) The terms "coal" and "mines of coal" are defined in ss. 3 (4) and 44 of the Coal Act, 1938.

(*c*) This form has been suggested and approved by counsel for the Ecclesiastical Commissioners for England.

(*d*) During the period between January 1, 1939, and July 1, 1942, all coal and mines of coal are held as if the existing owners thereof had, on January 1, 1939, entered into a contract to be completed on July 1, 1942, for the sale thereof to the Coal Commission: s. 3 (2) of the Coal Act, 1938.

(*e*) The phrase "all coal and mines of coal" is taken from s. 3 of the Coal Act, 1938. "Existing owners" are defined in s. 44.

thereof before the same shall have vested in the Coal Commission all such or the like working and other powers as are hereinafter reserved in relation to the mines and minerals hereby secondly excepted or reserved and SECONDLY (*f*) ALL quarries in or upon the scheduled lands and the right to work the same in the usual way and to carry away the same and also all mines and minerals whatsoever whether opened or unopened within and under the scheduled lands (other than and except the premises hereby first excepted or reserved) together with full power for the Owner his personal representatives and assigns and his lessees and agents and all persons authorised by him with workmen and others from time to time and at all times hereafter by means of underground workings or operations only (*g*) to win work get and carry away the said mines and minerals hereby secondly excepted or reserved and any like mines minerals and quarries in upon or under any adjacent or other lands and with full powers for those purposes to withdraw vertical and lateral support from the surface of the scheduled lands and from any buildings or works now erected or hereafter to be erected thereon notwithstanding any subsidence or other injury or damage that may thereby be occasioned to the scheduled lands or any buildings or works as aforesaid or any other injury or damage or loss whatsoever arising whether directly or indirectly from any such workings or operations as aforesaid which may be sustained by the Purchaser or his successors in title so nevertheless that the person or persons actually working under or by virtue of any of the powers aforesaid shall pay to the Purchaser or other the owner or occupier for the time being of the scheduled lands reasonable compensation for or in respect of any injury or damage to be thereby occasioned to any buildings or works now erected on the scheduled lands such compensation to be fixed

(*f*) The mines and minerals which are not to be acquired by the Coal Commission are here, for convenience, made the subject-matter of a separate reservation.

(*g*) This form has been designed for cases where coal is to be worked (if at all) by underground working only. Where the coal- or mineral-owner wishes to reserve the right to use the surface, the form should be altered to suit his requirements. By s. 8 (c) of the Coal Act, 1938, the existing owner is entitled to the possession and enjoyment of the property until July 1, 1942.

if the parties cannot agree by an arbitrator to be agreed upon between them or in case of their not being able to agree upon such arbitrator then by two disinterested persons as arbitrators one to be chosen by each party or their umpire and any such arbitration shall so far as applicable be governed by the provisions of "the Arbitration Act 1889" or any statutory modification thereof and Subject to the powers conferred by any now subsisting lease licence or agreement of or affecting any part of the premises hereby first or secondly excepted or reserved (*h*).

Form 25.

Lease of Workshops, Buildings and Land for Use as a Garage, the Lessor Covenanting to Erect an Additional Workshop and to Keep All the Premises in Repair (*a*).

Drafted by Alfred Powell, Solicitor.

Parties.

THIS LEASE made *etc.* BETWEEN A of *etc.* (hereinafter called "the Lessor" which expression shall where the context so admits include the estate owner or owners for the time being in respect of the reversion expectant on the term hereby created) of the one part and B of *etc.* (hereinafter called "the Lessee" which expression shall where the context so admits include his personal representatives and permitted assigns) of the other part WITNESSETH as follows:—

Covenant by the lessor to erect additional workshop.

1. The Lessor hereby covenants with the Lessee (who is at present in occupation of the premises hereby demised at a weekly rent of £——) that he the Lessor will forthwith and to the reasonable satisfaction of the Lessee erect on the area hatched

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(*h*) Although by virtue of the Law of Property Act, 1925, s. 65, the reservation will operate without any execution of the conveyance by the purchaser, it is advisable to take the conveyance in duplicate. (For a general discussion on the Coal Act, 1938, see the article on p. 190 of the last number of the Conveyancer.)

(*a*) Stamp: *ad valorem* on rent, unless an agreement has been previously stamped at that date, in which case stamp is 6d.

black on the plan hereon an additional workshop with pit bench and cement floor —— feet wide and —— feet long with —— doors and —— windows for use by the Lessee in connection with his business of a garage proprietor.

2. In consideration of the rents and covenants hereinafter reserved and contained and on the part of the Lessee to be paid and performed the Lessor hereby demises unto the Lessee

Parcels. ALL THAT piece or parcel of land situate in and fronting —— in —— aforesaid with the workshop and other buildings thereon the whole containing an area of —— perches or thereabouts as now in the occupation of the Lessee Together with the additional workshop to be erected on the said land by the Lessor as hereinbefore mentioned (hereinafter called " the additional workshop ") all which said premises are delineated and described in the said

Habendum. plan drawn hereon TO HOLD the same unto the Lessee from the —— day of —— 19— for the term of —— years determinable as

Reddendum. hereinafter mentioned YIELDING AND PAYING therefor until completion of the additional workshop the rent of £—— per annum and thereafter for the remainder of the said term the rent of £—— per annum such rents to be paid without any deduction (except for landlord's property tax and land tax (if any)) on the four usual quarter days in every year, the first payment of rent at the rate of £—— per annum to be made on the quarter day next after completion of the additional

Insurance rent. workshop such rent being apportioned if necessary AND ALSO (*b*) paying by way of further rent an annual sum equal to the sum or sums which the Lessor may from time to time pay by way of premium (including any increased premium payable by reason of any act or omission of the Lessee) for keeping the demised premises (including the additional workshop) insured against loss or damage by fire explosion or accident and if and when possible against damage by aircraft or missiles from aircraft as hereinafter mentioned such further rent to be paid without any deduction on the quarter day next ensuing after the payment of such premium or premiums

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(*b*) As to the position in regard to income tax where annual payments are made in respect of insurance premiums, see *House and Property Investment Co.* v. *Kneen*, [1938] 2 K. B. 274.

3. The Lessee hereby covenants with the Lessor in manner following:— Lessee's covenants.

(a) To pay the rents reserved on the days and in manner aforesaid and to pay all existing and future rates taxes (except landlord's property tax and land tax (if any)) and other outgoings payable by law in respect of the demised premises either by the owner or occupier thereof

(b) Forthwith to carry out any repairs to the demised premises including the additional workshop rendered necessary by damage or any cause other than fair wear and tear or accidental fire

(c) Not at any time during the continuance of the term hereby created except with the consent in writing of the Lessor to erect or place any additional building on the demised premises

(d) To permit the Lessor or his agents at all times during the term hereby created with or without workmen and others to enter the said demised premises to view the state and condition thereof and to carry out any work he may think necessary to the premises

(e) Not without the Lessor's written consent first obtained to carry on upon the demised premises any trade or business except that of a Petrol Filling Station—Garage and Motor Vehicle Repair Depot

(f) To observe all statutory provisions and all provisions contained in any regulation made by any duly constituted authority or in any policy of insurance relating to the demised premises with regard to the storage and use of petrol and other explosive or inflammatory oils or substances

(g) Not to do or suffer any act or thing on about or near the said demised premises which may cause damage or be or become a nuisance annoyance or inconvenience to the Lessor or the owners or occupiers of any adjoining premises and to use his best endeavours to prevent the causing of any nuisance damage obstruction annoyance or inconvenience to the occupiers of adjoining or neighbouring premises by any nocturnal noise or by unreasonable or noisy running of the engines of mechanically-propelled vehicles or sounding of bells hooters or

horns on such vehicles or other undue mechanical noise [or by permitting to draw up or remain stationary outside any adjoining or neighbouring premises any vehicle under the control of the Lessee or his permitted assigns or his or their employees or servants or of customers clients or other persons resorting to the said demised premises (*c*)]

(h) Not to assign transfer underlet or part with or share the possession of the said demised premises or any part thereof without the previous consent in writing of the Lessor

(i) At the expiration or sooner determination of the term hereby created quietly to yield up unto the Lessor the said demised premises Together with all additions and improvements made thereto in the meantime and all fixtures of every kind in or upon the said premises or which during the said term may be affixed or fastened to or upon the same except such fixtures and things as tenants are by law entitled to remove

(j) On the execution of these presents to pay the Lessor's costs of the lease and counterpart and the stamp duties thereon

Lessor's covenants.

4. The Lessor hereby covenants with the Lessee:—

(a) To keep the demised premises including the additional workshop in good and tenantable repair PROVIDED that he shall not be liable to carry out any repairs for which the Lessee is liable under his covenants hereinbefore contained

(b) To insure and at all times during the said term to keep insured (unless such insurance shall be vitiated by an act or omission of the Lessee) the said demised premises and the additional workshop against loss or damage by fire explosion or accident in the —— Office for the sum of £—— at the least and will whenever required produce to the Lessee the policy or policies of such insurance and the receipt for the last premium for the same and in case of destruction of or damage to the said premises or any part thereof by fire explosion or accident with all convenient speed to spend and lay out all moneys received in respect of such insurance in rebuilding or reinstating in a good and substantial manner the premises so destroyed or damaged

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(*c*) The words in brackets may be added as they indicate how the lessee is expected to run the business, but they do not in fact carry the burden of this covenant much further.

and in case such moneys shall be insufficient for the purpose to make good such deficiency out of his own moneys

(c) That if the Lessee shall duly pay the rents hereby reserved and shall duly perform and observe the covenants on his part hereinbefore contained the Lessee shall peaceably and quietly hold and enjoy the said demised premises during the term hereby created without any interruption by the Lessor or any person rightfully claiming under or in trust for him.

5. PROVIDED ALWAYS AND IT IS HEREBY AGREED AND DECLARED as follows:—

(a) It shall be lawful for either party hereto to determine the term hereby created at the end of the first —— or —— years thereof by giving to the other party not less than —— months' previous notice in writing expiring on any quarter day of his intention so to determine the said term and the said term shall accordingly in such case at the expiration of such notice entirely determine and cease and the provisions hereof become void But without prejudice to any right or claim of either party arising before such determination And provided always in the case of the Lessee having given such notice that the Lessee shall up to the date of such determination have paid the rents hereby reserved and performed and observed the covenants on his part herein contained.

(b) In the event of the non-payment of any of the rents hereby reserved within —— days of the same becoming due (whether legally demanded or not) or in the event of breach of any of the covenants and stipulations on the part of the Lessee herein contained or in the event of the Lessee having a receiving order in bankruptcy made against him or entering into any composition with his creditors [or taking the benefit of any Act for the relief of insolvent persons] then and in such case the Lessor may forthwith or at any time thereafter enter upon the said demised premises and determine the term hereby created without prejudice to any right he may have in respect of unpaid rent or any antecedent breach of covenant.

IN WITNESS *etc.*

Form 26.

First Codicil providing for one-half of Property held by Husband and Wife as Joint Tenants beneficially to be brought into Hotchpot by the Wife on the Death of the Husband.

Drafted by Frederick William Kay, Solicitor, of Rochdale.

I [*testator*] of *etc.* DECLARE this to be a first codicil to my will which bears date the —— day of —— 19—

WHEREAS by my said will I have bequeathed certain legacies and have given directions to my Trustees as to the division of my residuary estate Now:—

1. I HEREBY DECLARE that my wife [*name*] shall bring into hotchpot against the capital of the share of my residuary estate bequeathed to her by my said will a sum of money equivalent to one equal half part of the value at the date of my death of the whole of all freehold and leasehold properties, stocks, shares, securities, investments, deposits, moneys and securities for money which shall immediately prior to my death be vested or standing in the joint names of myself and my wife the said [*name*] and to which she will become absolutely entitled by right of survivorship on my death.

2. IN ALL other respects I confirm my said will.

IN WITNESS *etc.*

Form 27.

Agreement to be Used for Credit-Sale (*a*) **Transactions within the Hire-Purchase Act, 1938** (*b*).

Drafted by Hannah Cross, Barrister-at-Law.

Parties. THIS AGREEMENT made the —— day of —— 19— BETWEEN —— of *etc.* (hereinafter called "the Seller") of the one part

(*a*) A "'credit-sale agreement' means an agreement for the sale of goods under which the purchase price is payable by five or more instalments". See s. 21 (1) of the Hire-Purchase Act, 1938.

(*b*) The Hire-Purchase Act, 1938, which came into force on January 1, 1939, applies to all credit-sale agreements made on or after that date, under which the total purchase price does not exceed—

and —— of *etc.* (hereinafter called "the Buyer") of the other part

WHEREAS (*c*):

The Seller has previously stated in writing to the Buyer (as the Buyer hereby acknowledges) that the cash price of the goods comprised in this agreement is £53

Recital of the pre-agreement statement.

[Or] The Buyer (as the Buyer hereby acknowledges) has inspected [the goods comprised in this agreement] [like goods to the goods comprised in this Agreement] and at the time of his inspection tickets or labels were attached to or displayed with the said goods clearly stating the cash price [of the said goods as a whole] [of all the different articles or sets of articles comprised in the said goods]

[Or] The Buyer (as the Buyer hereby acknowledges) has selected the goods by reference to a catalogue [price list] [advertisement] which clearly stated the cash price of [the said goods as a whole] [of all the different articles or sets of articles comprised in the said goods]

NOW IT IS HEREBY AGREED AND DECLARED as follows:—

1. THE SELLER hereby agrees to sell to the Buyer and the Buyer hereby agrees to purchase from the Seller the goods (the

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(a) where the agreement relates to a motor vehicle or railway waggon or other railway rolling stock, the sum of £50;

(b) where the agreement relates to livestock, the sum of £500; and

(c) in any other case, the sum of £100.

But only certain clauses of the Act apply to credit-sales, and by bringing a transaction within the definition and scope of a credit-sale it is possible for a seller to avoid many of the restrictions which, since 1939, surround a hire-purchase agreement.

(*c*) Before making any credit-sale agreement under which the total purchase price exceeds £5, the seller must, subject to the proviso mentioned below, state the cash price in writing to the prospective buyer: s. 3 (1). The seller is advised either to retain a copy of the statement so made or to require the prospective buyer to give a receipt for the statement. The section, however, provides that the statement shall be deemed unnecessary if the buyer has inspected or selected the goods in the circumstances set out in either of the (alternative) recitals drafted above. Hence their insertion in this draft. Nevertheless, a seller, as indicated above, is advised not to rely only upon the recitals. Where the total purchase price is under £5 no statement of cash price or recital thereof is necessary.

The proviso gives the Court power to dispense with the requirements of the section on terms and in certain events, for which see below, note (*d*).

cash price whereof is £53) (*d*) described in the Schedule hereto (hereinafter referred to as "the goods") on the terms and conditions following.

Instalments.

2. THE BUYER shall pay for the goods (the total purchase price whereof is £60) (*d*) by paying an instalment of £10 on completion of this Agreement and by paying thereafter five equal and consecutive quarterly instalments of £10 each upon the usual quarter days beginning on the quarter day immediately following the date of the completion of this Agreement (*d*).

Property in goods.

3. THE GOODS (whether or not in the possession of the Buyer) shall remain the sole and absolute property of the Seller until the total purchase price thereof has been paid (*e*).

Seller's rights if instalments are in arrear.

4. (i) IF ANY of the said quarterly instalments payable hereunder shall be in arrear for fourteen days (*f*) (whether demanded or not) the Seller may by notice in writing either require the Buyer forthwith to pay such amount of the total purchase price as may then be unpaid (it being hereby expressly agreed that the whole unpaid amount of the total purchase price

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(*d*) Credit-sale agreements under which the price exceeds £5, and guarantees relating thereto, cannot be enforced unless—

(i) a note or memorandum is made and signed by the buyer personally and by the other parties either personally or by their agents.

(ii) the total purchase price, the cash price, the amount of each instalment, the date (or mode of determining the date) when each instalment is payable, and a list of the goods is stated in the agreement.

(iii) a copy of the agreement is delivered or sent to the buyer within seven days of the making of it.

The Court has power, subject to such conditions as it thinks fit to impose, to dispense with any of the requirements specified in paragraphs (ii) and (iii) above or with the requirement relating to the pre-agreement statement or ascertainment of cash price if satisfied that the buyer has not been prejudiced and that such dispensation would be just and equitable.

(*e*) A clause to this effect is essential as otherwise the document might be considered a bill of sale. If, in an agreement to buy containing a power to seize, the property in the goods passes on delivery of possession, the agreement *is* a bill of sale. If, however, the parties agree that the goods shall remain the sole and absolute property of the seller, the document is not a bill of sale. See Sale of Goods Act, 1893, s. 17, and *MacEntire* v. *Crossley Bros.*, [1895] A. C. 457.

(*f*) It is necessary to ensure that the transaction is a credit-sale in form as well as in name. Therefore the power to demand full payment or re-delivery of the goods is made to arise only on non-payment of the instalments of purchase price. A power to re-take goods in the event of (say) distress makes the transaction too like a hire-purchase transaction.

shall become forthwith due and payable upon any default in respect of the payment of any instalment thereof) or require the Buyer forthwith to redeliver the goods to the Seller at the address of the Seller mentioned above or at such address as he may in writing direct (*g*)

(ii) If the Buyer upon receipt of a notice in writing requiring him to pay as aforesaid fails to pay in full within seven days, the Seller may then by notice in writing require him to redeliver the goods to the Seller at the address of the Seller mentioned above or at such address as the Seller may in writing direct Redelivery.

(iii) If the Buyer shall fail to redeliver the goods to the Seller within seven days of a requisition made pursuant to either sub-clauses (i) or (ii) hereof the Seller may forthwith and without further notice seize and resume possession of the goods and for those purposes may enter any premises where the goods may actually be and any premises where the Seller reasonably believes the goods to be (*h*). Seizure.

(*g*) The Hire-Purchase Act, 1938, s. 5 (c), renders void any provision subjecting "a hirer, after the determination of the hire-purchase agreement or the bailment in any manner whatsoever", to any greater liability than that imposed by the Act in the case of determination by the hirer himself.

This sub-section introduces the phrase "or the bailment in any manner whatsoever", and thereby creates several problems. A credit-sale under which the property is not to pass until the total purchase price has been paid is a "bailment" and therefore might be thought to be affected by this sub-section. But as the sub-section begins with a reference to "a hirer" it appears that "bailment" must be construed as a bailment of hire only. If this construction be correct, the sub-section will not apply to credit-sales, and therefore there is no restriction on the liabilities which can be imposed on the buyer. Accordingly he can be made to re-deliver the goods to the seller's address (a provision which would be void under a hire-purchase agreement).

(*h*) The Hire-Purchase Act, 1938, s. 5 (a), renders void "any provision in any agreement" which authorises an owner or his agent to enter upon premises for the purpose of taking possession of goods which have been let "under a hire-purchase agreement". In spite of the wide scope of the opening phrase "any provision in any agreement" the sub-section does not refer expressly to credit-sales. Since in other parts of the Act (notably in s. 1 and in the definition clause) there is an express reference to credit-sales agreements (in addition to the references to hire-purchase agreements) it can be assumed that a section which is silent as to credit-sales agreements does not refer to them impliedly. Accordingly

Damages. 5. (i) If in the opinion of the Seller, the value of the goods so returned or seized be less than the amount of the total purchase price then unpaid the Seller shall be entitled to recover the difference from the Buyer by way of damages for non-performance by the Buyer of this Agreement

Repayments. (ii) If, in the same opinion, the value of the goods so returned or seized be greater than the amount of the total purchase price then unpaid the Seller shall pay the difference to the Buyer

Mode of valuation. (iii) Provided always that in estimating the value of the goods for the purpose of this clause, the Seller shall be entitled to deduct from the market value the costs and expenses (if any) incurred by the Seller in recovering the goods.

6. The Buyer shall not (unless he has previously paid the total purchase price)—

Prohibition against parting with possession. (a) sell assign underlet pledge charge suffer any lien to arise upon, or otherwise part with possession of the goods (except for purposes of repair) without first obtaining the Seller's consent in writing

No alterations. (b) make any alteration to the goods without first obtaining the Seller's consent in writing

Removal restricted. (c) remove or permit the removal of the goods from the Buyer's address as mentioned above without first (a) specifying the address at which the goods will be kept in the future and (b) obtaining the Seller's consent in writing to such removal.

7. The Buyer shall (unless he has previously paid the total purchase price)—

Repair. (a) *Keep* the goods in proper repair and condition fair wear and tear alone excepted, and permit the Seller and all persons authorised by him to have access to the goods at all reasonable times for the purpose of inspecting and examining the condition of the same

Insurance. (b) *Insure* and keep insured to the full value thereof in some respectable insurance office (the selection whereof is to

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a seller under a credit-sale agreement may still be given power to enter premises for the purpose of retaking his goods, and such a power is therefore inserted here.

be subject to the approval of the Seller if he shall so require) the goods against all usual risks of loss and damage by theft or fire and

Punctually pay all necessary premiums for such insurance and produce receipts to the Seller for such payments if he shall so require and comply with all conditions and do all other things necessary to keep such policy in full force and

Apply all sums paid by the insurers in respect of the risk assured in repairing the damage done to or in or towards re-instating or replacing the goods or such part of them as shall have been damaged or destroyed.

No warranties given by Buyer.

8. THE BUYER is deemed to have had inspection of the goods before he executed this Agreement and any description of the goods by the Seller shall be deemed to be for the purpose of identification only and shall not constitute or import any warranty of its accuracy.

The Seller (as the Buyer hereby expressly acknowledges) gives no warranty or condition as to the quality or fitness for any particular purpose of the goods and will not be responsible for the condition state of repair or quality or maintenance of the goods.

Concessions not to affect Seller's rights.

9. ANY RELAXATION forbearance or indulgence (including any giving of time) by the Seller in respect of any non-performance or breach by the Buyer of this Agreement shall not estop or preclude the Seller from at any future time pursuing all or any of the remedies available to him for that non-performance or breach or any future similar omissions or acts and shall not constitute any modification or waiver of this Agreement and shall not in any other way prejudice the rights of the Seller hereunder.

Manner of payment.

10. (a) SUBJECT TO sub-clause (b) hereof all payments of money due under this Agreement shall be made direct to the Seller

(b) No other person shall be deemed to have authority to accept payment on behalf of the Seller unless the Seller shall give notice in writing to the Buyer to that effect.

Notices.

11. ANY NOTICE or demand by the Seller to the Buyer shall be sufficiently given if sent in writing by post or otherwise to the address of the Buyer mentioned above or to any other address which the Buyer in a written communication to the Seller purports to have and shall be deemed to have been given if sent by post at the time at which it would have been received in the ordinary course of post and if sent otherwise than by post at the time when it was actually delivered at such address as aforesaid.

AS WITNESS *etc.*

THE SCHEDULE ABOVE REFERRED TO.

[*Here insert inventory of goods with identification marks.*]

Signatures of parties (*i*).

Witnesses.

(*i*) ADDITIONAL NOTES:—

(1) By the Hire-Purchase Act, 1938, s. 5 (d) and (e), provisions purporting to treat a person acting on behalf of a seller in connection with the formation or conclusion of a credit-sale agreement as the agent of the buyer, or purporting to relieve a seller from liability for acts or defaults of any person acting on his behalf in connection with the formation or conclusion of a credit-sale agreement, are void. This section (unlike s. 3) applies to credit-sale agreements where the total purchase price is £5 or under.

(2) S. 6 of the Hire-Purchase Act, 1938, which prevents the enforcement of an agreement by any person who is in default in supplying the information or copy memorandum required thereunder, applies to credit-sale agreements and should be borne in mind by sellers. A form to be used for supplying the statutory information was given in *The Conveyancer*, December, 1938, p. 510, and see notes thereon. This section (unlike s. 3) applies to credit-sale agreements even though the total purchase price is £5 or under.

(3) The Act does not apply to Scotland.

(4) A copy of this agreement must be sent or delivered to the buyer within seven days of the making thereof. A receipt for the copy should be obtained. See note (*d*) above and s. 3. The buyer must sign personally.

Form 28.

Conveyance, by the Administrators of an Insolvent Estate (the Executors having renounced Probate of the Will of the Deceased), of Freehold Property subject to a Perpetual Yearly Rentcharge but freed and discharged from an Equitable Mortgage executed by the Deceased in favour of a Bank (*a*).

Drafted by F. W. Towns, LL.M., Solicitor.

THIS CONVEYANCE (*b*) is made the —— day of —— 19— BETWEEN A B of *etc.* and C D of *etc.* (hereinafter called "the Vendors") of the first part the Z Bank, Ltd. whose registered office is situate at *etc.* (hereinafter called "the Bank") of the second part and E F of *etc.* (hereinafter called "the Purchaser") of the third part Parties.

WHEREAS:

1. BY a Conveyance dated the —— day of —— and made between L M of the one part and X Y (hereinafter called "the deceased") of the other part the property hereinafter described and intended to be hereby conveyed was conveyed to the deceased in fee simple subject to a perpetual yearly rentcharge of £—— reserved/limited in use (*c*) by a Conveyance dated the —— day of —— and made between R S of the one part and T U of the other part and to the covenants and conditions powers provisions and remedies in the now reciting Conveyance contained or referred to. Recitals.

(*a*) Stamp, *ad valorem*. This precedent has been drafted to meet a case where a testator has died insolvent and the executors of his will have renounced probate thereof, letters of administration with the will annexed being granted to the residuary legatee and devisee for life, and to one of the residuary legatees and devisees substituted under the will. The personal representatives, who are administering the estate out of Court, are selling the property at a figure less than the amount due to the mortgagees who, however, are willing to join in to release the property upon receipt of the purchase money in part satisfaction of the amount owing to them and will prove in the estate of the deceased for the balance.

(*b*) A memorandum of the Conveyance should be endorsed on the letters of administration to the estate of the deceased: s. 36, A. of E. Act, 1925.

(*c*) If the perpetual yearly rentcharge was created before January 1, 1926, it would be limited out of the property by a use, but if created after December 31, 1925, it would be reserved thereout.

2. By a Memorandum under the hand of the deceased and dated the —— day of —— the deceased declared that he had deposited with the Bank the title deeds and writings specified in the Schedule thereto as a security by way of equitable charge upon the property hereinafter described and intended to be hereby conveyed for the payment of any sum or sums of money payable thereunder as therein mentioned and undertook upon request to execute to the said Bank a Mortgage of the said property.

3. The deceased died on the —— day of —— having made and duly executed his last Will and Testament dated the —— day of —— and therein named —— and —— executors and residuary legatees and devisees in trust who renounced probate thereof on the —— day of —— and letters of administration with the Will annexed were on the —— day of —— granted out of the District Probate Registry at —— to the Vendors.

4. The Vendors as such personal representatives as aforesaid and in exercise of the statutory power in that behalf conferred upon them have agreed with the Purchaser for the sale and transfer to him of the estate in fee simple in possession of the property hereinafter described and intended to be hereby conveyed subject as hereinafter mentioned but otherwise free from incumbrances at or for the price or sum of £——.

5. There is now owing to the Bank upon the security of the said memorandum and deposit of title deeds certain moneys in excess of the said purchase money of £—— as the Bank hereby acknowledges.

6. It has been agreed that the said purchase money of £—— shall be paid to the Bank in part discharge of the said mortgage debt so owing to it, and that the Bank shall join in these presents in manner hereinafter appearing.

7. The Vendors have not previously to the execution of this Conveyance given or made any assent or conveyance in respect of any legal estate in the said property or any part thereof (*d*).

(*d*) S. 36, A. of E. Act, 1925.

NOW THIS DEED WITNESSETH as follows:— Witnesseth.

1. IN pursuance of the said agreement and in consideration of the sum of £—— now paid by the Purchaser at the request of the Vendors to the Bank in part discharge of the moneys owing to it under the said memorandum and deposit of title deeds (the receipt whereof the Bank hereby acknowledges) the Vendors as personal representatives of the deceased hereby grant and convey and the Bank as mortgagee hereby releases and confirms unto the Purchaser ALL THAT plot or parcel of land situate in —— in the County of —— containing in the whole —— superficial square yards of land or thereabouts be the same more or less which said plot of land is more particularly delineated and described in the plan drawn in the margin of the said Conveyance of the —— day of —— and therein edged with red AND ALSO ALL THAT messuage or dwelling-house and outbuildings erected thereon or on some part thereof and situate —— [*or as the case may be*] TO HOLD the same unto the Purchaser in fee simple freed and discharged from all right of redemption and from all money secured by and from all claims and demands under the said memorandum and deposit but subject to the future payment of the said perpetual yearly rent-charge of £—— and to the covenants and conditions powers provisions and remedies contained or referred to in the said Conveyance of the —— day of ——. Parcels. Habendum.

2. THE covenant referred to in section 77 (1) (A) of the Law of Property Act 1925 and contained in Part VII of the Second Schedule to the said Act shall be incorporated in these presents and shall be deemed to extend to and apply for the benefit of the estate and effects of the deceased (*e*). Covenant.

3. THE Vendors hereby acknowledge the right of the Purchaser to production of the said grant of letters of administration to the estate of the deceased and to delivery of copies thereof. Acknowledgment for production.

4. [*Certificate as to value if required.*]

IN WITNESS *etc.*

(*e*) A reference to the implied covenant under s. 77 of the L. P. Act, 1925, is advisable in order that its operation may be extended to apply for the benefit of the estate and effects of the deceased.

Form 29.

Will of a Married Man of Small Means giving an Income to his Widow which is not to fall below nor rise above a Defined Limit, with Ultimate Trusts in Favour of Issue (*a*).

I, Z of *etc.* hereby revoke all testamentary dispositions heretofore made by me AND DECLARE this to be my last will.

Appointment of Executors and Trustees.

1. I APPOINT A of *etc.* and B of *etc.* (hereinafter called "my Trustees") to be executors and trustees of this my will.

2. I APPOINT A of *etc.* and B of *etc.* to be guardians of my infant children.

Gift of chattels.

3. I GIVE to my wife X absolutely free of duty all furniture articles and effects of household domestic or personal use ornament occupation or diversion belonging to me.

Pecuniary bequest.

4. I GIVE to my said wife the sum of £—— free of duty to be paid to her as soon as may be after my decease for her immediate requirements.

Gift of residue.

5. I DEVISE AND BEQUEATH all my real and personal estate not otherwise disposed of by this my will (*b*) unto my Trustees

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(*a*) This will is intended to meet the case of a married man who does not wish to make an elaborate will but to provide first for his wife and then for his children. Where the estate is comparatively small, some testators do not want to leave the whole estate to a wife absolutely, when whatever is unspent by her will pass under her will and again be subject to the payment of estate duty, but wish to secure to her a minimum income, which, if the income of the estate is insufficient, is to be made up out of capital. If the intention is that she is to benefit to some extent, if the income increases, it is not desirable to give to her an annuity. This will secures to the widow a minimum income, which may rise in good years to a maximum sum; subject to that interest, the estate goes to the children.

(*b*) Unless the draftsman has specific instructions as to the existence of powers of appointment, it is generally safest to omit all reference to powers. A general devise or bequest operates, under s. 27 of the Wills Act, 1837, as an exercise of any *general* power of appointment. The presumption is against a general devise or bequest operating as an exercise of a *special* power. Most testators would not wish to exercise a special power when making a residuary gift. It is clear that much uncertainty results where it can be contended that, by reason of a reference to powers, a residuary gift operates as an exercise of a special power. If the draftsman has no instructions as to special powers, the best course is to leave the gift in default of appointment to operate, should there be any such power, without using general words which the ordinary testator

upon trust to sell call in and convert the same into money at such time or times and in such manner as they shall think fit (but as to reversionary property not until it falls into possession unless it shall appear to my Trustees that an earlier sale would be beneficial) with power to postpone (*c*) the sale calling in and conversion of the whole or any part or parts thereof for so long as they shall think proper without being responsible for loss and I DIRECT that the income of the premises remaining unsold shall be applied as if the same were income accruing from the investments hereinafter directed to be made of the proceeds of sale thereof and that no reversionary or other property not actually producing income shall be treated as producing income for the purposes of this my will.

Payment of debts.

6. MY TRUSTEES shall out of the moneys to arise from the sale calling in and conversion of my real and personal estate and out of my ready moneys pay my funeral and testamentary expenses and debts and the legacies given by this my will or any codicil hereto.

Trust to invest.

7. MY TRUSTEES shall at their discretion invest the residue of the said moneys in the names of my Trustees in or upon any investments for the time being authorised by law for the investment of trust moneys [*or*, in or upon any investments hereby authorised] with power to vary or transpose such investments for or into others of a nature hereby authorised.

Beneficial trusts.

8. MY TRUSTEES shall stand possessed of the residue of the said moneys and of the investments for the time being representing the same and of such part of my estate as shall for the time being remain unsold and unconverted (all which premises are hereinafter referred to as "the trust fund") upon the trusts following that is to say:—

Income to wife for life.

(i) My Trustees shall pay the income of the trust fund to my said wife during her life [*or*, so long as she shall remain my widow] PROVIDED ALWAYS that if in any year the income

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will not understand and which may operate to exercise powers the extent and nature of which are unknown to the draftsman and plainly not in the mind of the testator.

(*c*) It is advisable to give an express power to postpone sale as s. 25 (1) of the Law of Property Act, 1925, only applies to trusts for sale of land.

of the trust fund shall be less than £—— my trustees shall make up the income so payable to my said wife to the said sum of £—— out of capital and in the event of the said income exceeding the sum of £—— + £—— my Trustees shall hold such excess income upon trust in the first place to invest the same to make good any capital moneys applied in respect of any previous year or years in making my said wife's income up to the said sum of £—— and subject to replacing any capital so applied as aforesaid shall hold such excess income upon trust for my children as tenants in common in equal shares.

Power of appointment.

(ii) After the death [*or* marriage] of my said wife my Trustees shall stand possessed of the capital and future income of the trust fund IN TRUST for my issue in such shares and in such manner as my said wife shall by deed or deeds revocable or irrevocable or by will or codicil appoint.

Trust for children.

(iii) After the death [*or* marriage] of my said wife in default of and subject to any such appointment my Trustees shall stand possessed of the capital and future income of the trust fund IN TRUST for all (*d*) or any my children or child who shall attain the age of twenty-one years or marry under that age [*or*, who being male attain the age of twenty-one years or being female attain that age or marry] if more than one in equal shares [*or*, After (*e*) the death [*or* marriage] of my said wife my Trustees shall stand possessed of the capital and income of the trust fund IN TRUST for all or any my children or child living at the death of the survivor of myself and my said wife and the children or child then living of any then deceased child of mine who whether children or grandchildren attain the age of twenty-one years or marry under that age if more

(*d*) This follows the trusts on intestacy in s. 47 (1) (i) of the Administration of Estates Act, 1925. There appears to be no adequate reason for preventing a son's share vesting on his marriage under twenty-one and, if it does not so vest, should he marry and die under twenty-one the result might operate oppressively.

(*e*) Where the testator and his wife are elderly and the testator does not wish to divest her on remarriage this alternative trust may be convenient. Should any child predecease the parents, if the share is made to pass directly to grandchildren the death duties otherwise payable on the child's death will be saved.

than one in equal shares as tenants in common but so that the children of any deceased child of mine shall take equally between them as tenants in common only the share which their parent would have taken had he or she survived me and attained a vested interest] [*or*, IN TRUST for all or any of my children or child living at my death who attain the age of twenty-five years if more than one in equal shares as tenants in common PROVIDED ALWAYS that if any child of mine shall die in my lifetime (whether before or after the date of this my will) or shall fail to attain the age of twenty-five years leaving a child or children such child or children attaining the age of twenty-one years or marrying under that age shall take by substitution if more than one as tenants in common in equal shares the share in my residuary estate which such deceased child of mine would have taken had he or she survived me and attained a vested interest.]

Hotchpot clause.

(iv) No child of mine who (or whose issue) shall take any part of the trust fund under any appointment by virtue of the power hereinbefore contained shall in default of appointment to the contrary be entitled to any share of the unappointed part thereof without bringing the share or shares appointed to him or her or to his or her issue into hotchpot and accounting for the same accordingly.

Ultimate trusts.

(v) In the event (*f*) of the trusts hereinbefore declared failing my Trustees shall stand possessed of my residuary estate UPON TRUST for Y absolutely.

Powers of advancement and maintenance.

9. THE STATUTORY powers of advancement and maintenance are applicable hereto and shall be exercisable by my Trustees [AND I FURTHER DECLARE (*g*) that the said powers of advancement and maintenance shall continue to be exercisable by my

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(*f*) Where, as here, the trusts are all in favour of the testator's wife and children, it is advisable to have an ultimate residuary gift, otherwise on the failure of the trusts the wife will take under the intestacy (*Re McKee*, [1931] 2 Ch. 145), which is generally not the intention as she is provided for by the will.

(*g*) If the vesting is postponed beyond twenty-one, this provision should be inserted. It enables the trustees to accumulate income not applied for maintenance. If no express provision for accumulation is inserted the beneficiary is entitled to the whole income under s. 31 (1) (ii) of the Trustee Act, 1925: *Re Turner*, [1937] Ch. 15.

Trustees for the benefit of any child of mine who shall have attained the age of twenty-one years but who shall not have attained the age of twenty-five years and the income of the share of my residuary estate of any child of mine who has not attained a vested interest therein which shall not be required for maintenance shall during the period of twenty-one years from my death be accumulated in manner provided by section 31 (2) of the Trustee Act 1925].

Power of appropriation.

10. My Trustees (*h*) may in extension of the power of appropriation conferred on personal representatives by section 41 of the Administration of Estates Act 1925 at any time at their discretion appropriate any part of the trust fund in its then actual condition or state of investment in or towards satisfaction of any legacy or any share in the trust fund without the necessity of obtaining the consent of any persons or person whose consent is required to the exercise by personal representatives of the power of appropriation conferred by that section.

Appointment of new trustees.

11. The power of appointing a new trustee or new trustees shall be vested in my said wife during her life And I declare (*i*) that she or the persons for the time being having power to appoint new trustees hereof may (with the consent in writing of all beneficiaries then interested in my residuary estate who have attained the age of twenty-one years) appoint the Public Trustee or a trust corporation to be a trustee of this my will and any trust corporation so appointed may charge and be paid the fees from time to time ordinarily charged by such corporation.

12. Any trustee of this my will being a solicitor or other person engaged in any profession or business may be so employed or act in the trust hereof and shall be entitled to charge and be paid all usual or proper professional or other charges for

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(*h*) Where an appropriation is made under an express power no *ad valorem* stamp duty is payable on the conveyance or transfer of the appropriated property. Where no express power is inserted such duty is payable: *Dawson* v. *I. R. Commissioners*, [1905] Ir. R. 69.

(*i*) If the testator contemplates the appointment at any time of a trust corporation, other than the public trustee, an express power for the trust corporation to charge is essential. If such a power is not inserted, an application will be necessary to the Court to sanction the payment of the corporation's fees: *Forster* v. *Williams Deacons Bank*, [1935] Ch. 359.

any business or acts done by him or his firm in relation to the premises whether in the ordinary course of his profession or business or not and although not of a nature requiring the employment of a solicitor or other professional person.

IN WITNESS *etc.*

Form 30.

Codicil of a Married Woman Providing that in the Event of Her Surviving Her Husband Her Daughter shall be Made a Ward of Court (*a*).

I —— of *etc.* the wife of —— hereby declare this to be a codicil which I make this —— day of —— 1938 to my will which bears date the —— day of —— 19—

1. (i) I appoint to be the guardian of my infant child (1) A the wife of B of *etc.* and on her dying or being unable or refusing to act or to continue to act as such guardian (2) C of *etc.* Appointment of guardian.

(ii) In this codicil the expression " my guardian " shall mean the person who under the foregoing shall for the time being be the guardian of such child of mine or would be such guardian if no guardian of my said child had been appointed by my husband or by the Court.

2. (i) If at my death my infant child shall not be a ward of Court I give to my said infant child the sum of £1,000 free of death duties and I DIRECT that such sum shall be paid as soon as possible to my guardian and shall be held by her in Pecuniary legacy for infant.

(*a*) There are cases in which it is desirable that on the death of its parents a child should become a ward of Court. A codicil in this form assures that this shall be done. The guardian will immediately on the death of the parent start proceedings in the Chancery Division for the administration of the legacy, when the infant will automatically become a ward of Court: *Simpson on the Law of Infants* (4th ed.), p. 165. All the property to which the infant may then be entitled will come under the control of the Court and the maximum of security for the infant's property and due maintenance and education will be assured.

Direction to take proceedings to make infant a ward of Court.

trust for such child and I further direct that with all dispatch after my death my guardian shall take or join in taking all necessary or further steps and proceedings to make my said child a ward of Court as soon as possible

Provision as to costs of legal proceedings.

(ii) All legal costs and expenses incurred by my guardian in or about or preliminary or incidental to the making of my child a ward of Court or in consequence of such child being a ward of Court of my guardian being under the foregoing appointment or under any order or orders of the Court the guardian or one of the guardians of such child shall be paid out of my estate as if the same were part of my testamentary expenses.

Bequest of annuity to guardian.

3. (i) I give to my guardian an annuity of £100 per annum (free of death duties and income tax but not sur-tax) such annuity to commence from the time she accepts such guardianship and to continue so long as she is my guardian and to be paid quarterly on the usual quarter days in every year

(ii) Such annuity is given to my guardian personally as some recompense for her trouble and care in the matter and not in any way for the benefit of my child

(iii) The said annuity shall not be payable to my guardian in respect of any period during which (owing to any order of the Court or otherwise) she has not (whether alone or jointly with another or others) the legal custody of my said child and shall be payable only so long as the home of my said child is that of my guardian.

4. The foregoing provisions of this codicil shall only take effect in the event of my surviving my husband.

In witness *etc.*

Form 31.

Transfer of Whole Subject to Registered Charge—the Chargee joining to Release Vendor from the Mortgage Debt and Interest. Variation where Charge is a Building Society Mortgage (*a*).

H.M. LAND REGISTRY.

LAND REGISTRATION ACTS, 1925 AND 1936.

County or County Borough

Title No.

Property

Date —— of —— 19— In consideration of (*purchase-price of equity*) pounds (£——) the receipt whereof is hereby acknowledged

I, —— of —— (hereinafter called "the Vendor") as beneficial owner hereby transfer to —— of —— (hereinafter called "the Purchaser") the land comprised in the title above mentioned subject to the charge [mortgage] in favour of —— (hereinafter called "the Mortgagee [Society]") dated the —— day of —— 19— and registered on the —— day of —— 19—

The Purchaser hereby covenants with the Mortgagee to pay to him on the —— day of —— next the principal sum of £—— secured by the charge with interest thereon from the —— day of —— last [*or if interest has been paid to date,* from the date hereof] at the rate of —— per cent. per annum and if the said principal sum shall not be paid on that day then so long thereafter as any part thereof remains owing to pay interest thereon at the rate aforesaid by equal half-yearly payments on the —— day of —— and the —— day of —— in every year.

[*Or, in case of building society mortgage,* The Purchaser hereby covenants with the Society that he will duly and punc-

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(*a*) This form was drafted by Mr. Edgar Cambridge, solicitor, of Woodford Green.

Stamp *ad valorem* on the aggregate amount of the purchase money and the amount due on the charge or mortgage.

tually repay to the Society according to the rules thereof the sum of £—— the principal sum now owing upon the said mortgage together with interest for the same by monthly instalments of —— during the remainder of the term of —— years from the —— day of —— 19— the first of such payments to be made on the —— day of —— next and the subsequent payments to be made without deduction at regular successive intervals of one month during the whole of the said term until the whole of the said sum of £—— and interest shall be fully paid and satisfied and also to observe and perform the covenants and obligations in the said mortgage on the part of the mortgagor contained] (*b*).

Here insert repayment period under mortgage.

The Mortgagee [Society] hereby releases the Vendor from his covenant to pay principal and interest contained in the said charge [mortgage] and from all claims and demands under or in respect thereof.

[*Statement as to value if applicable*] (*c*).

(*Signatures and seals of all parties.*)

(*b*) This clause will be varied to follow the wording of the covenant to pay principal and interest contained in the original mortgage.

(*c*) This statement is only applicable if the aggregate amount of the purchase money and the amount due on the charge or mortgage is £500 or less.

Form 32.

Legal Charge by Company (ranking behind Building Society Mortgage) to Secure Repayment of Moneys Payable by Building Owner under a Building Contract, the Building Owner joining to give Joint and Several Covenants and to Accept Primary Liability for the Debt (*a*).

Drafted by E. O. Walford, LL.D., Solicitor.

THIS LEGAL CHARGE made the —— day of —— 19— BETWEEN —— of *etc.* (hereinafter called "the Company") of the first part —— of *etc.* (hereinafter called "Mr. ——") of the second part and —— of *etc.* (hereinafter called "the Chargees") of the third part

Date.
Parties.

WHEREAS by a conveyance dated —— and made between —— ALL THAT parcel of land —— was conveyed to the Company in fee simple

Recitals: (i) Conveyance to company;

AND WHEREAS by a legal charge dated —— and made between the Company of the one part and [*first mortgagees*] of the other part (hereinafter called "the first charge") the said premises were [charged by way of legal mortgage] with the payment to the said —— of the sum of £——

(ii) First charge by company;

AND WHEREAS the Company has at the request of Mr. —— agreed to secure in manner hereinafter appearing the repayment to the Chargees of all sums due from time to time by the Com-

(iii) Agreement for second charge.

(*a*) It is becoming a common practice for builders to take a charge upon the land on which they are erecting a building by way of security for the repayment of the moneys owing under the building contract.

In the present case the land is vested in a company but the building contract has been entered into by an individual. The form can be readily adapted to cases in which the property belongs to the building owner who has entered into the contract and is accordingly charged by him. This form provides for payment of the moneys secured on demand. Accordingly, there is no provision that the moneys shall forthwith become payable in the event of the building owner committing an act of bankruptcy, or in the event of the first mortgagee's power of sale becoming exercisable, or upon any of the other events in which a second mortgagee's power of sale becomes exercisable. If, however, the one calendar month period is allowed to remain in clause 10 it may be considered whether the usual provision as last mentioned should be inserted. In that case clause 10 will also require variation accordingly.

pany under a certain building contract dated the —— day of —— 19— and made between Mr. —— of the one part and the Chargees of the other part being a contract for the erection of a [block of flats] on the land hereby charged.

Testatum.

WITNESSETH as follows:—

Covenant for repayment of mortgage moneys.

1. THE Company and Mr. —— hereby jointly and severally covenant with the Chargees on demand in writing made to the Company or Mr. —— to pay to the Chargees all sums which shall from time to time be due and owing to the Chargees under the said building contract or these presents together with interest on each such sum from the date upon which it [became or] shall become payable under the said building contract or under these presents (as the case may be) at the rate of £—— per centum per annum.

Charge by way of legal mortgage.

2. THE Company as beneficial owner hereby charges by way of legal mortgage All the premises comprised in the said conveyance with the payment of all moneys (including interest) hereby covenanted to be paid to the Chargees subject to the first charge.

As between surety and company the Building Owner to be primarily liable but without prejudice to the joint and several covenant.

[3. (*b*) As between Mr. —— on the one hand and the Company on the other hand Mr. —— shall be primarily liable for the payment of the moneys hereby secured but this provision shall not affect the Chargees or in any way preclude the Chargees from enforcing or having recourse to all or any remedies or means for recovering payment thereof which may be available against the Company and Mr. —— as joint and several principal debtors at such times or in such order and manner as the Chargees shall think fit.

Company to be joint and several principal debtor.

4. ALTHOUGH as between Mr. —— and the Company the Company is only a surety for Mr. —— yet as between the Company and the Chargees the Company shall be deemed to be a principal debtor jointly and severally with Mr. —— for the moneys hereby secured accordingly and the Company and the mortgaged premises respectively shall not be released by any time allowed or any other indulgence given to Mr. ——

(*b*) Clauses 3 and 4 will not be required if the property belongs to the building owner who has entered into the building contract.

(or by any act matter or thing whereby the Company if only a surety) or the premises comprised in this security might otherwise be released.]

Covenant to keep in repair and insure.

5. So long as any money remains owing on this security the Company and Mr. —— or one of them will keep all buildings erections and structures forming part of the premises hereby charged in good and substantial repair and will also keep them insured against loss or damage by fire in such sum as will cover the cost of rebuilding and reinstating the same in case of total destruction by fire in such office or with such other reputable and responsible insurers and through such agency as the Chargees shall from time to time direct and will on demand produce to the Chargees or their agents the policy or policies for such insurance and the receipt for each such payment and in case of the destruction of or any damage by fire to any buildings or other erections or structures forming part of the premises hereby charged will forthwith rebuild or reinstate all such buildings erections or structures (causing all moneys received from any such insurance as aforesaid to be applied in the first place in making good the loss or damage in respect of which the same shall have been received and making good any deficiency out of its own moneys) [Provided that so long as the Company shall maintain the insurance of the buildings in accordance with the covenant in that behalf contained in the first charge and shall produce to the Chargees on demand satisfactory evidence thereof then notwithstanding that such covenant shall differ from this present covenant the Company shall be deemed to have complied with its obligations under the covenant in that behalf hereinbefore contained PROVIDED ALSO that the Company shall not be bound to insure the said buildings for any period during which the Chargees are themselves bound to insure the said buildings by virtue of the said building contract] (*c*).

(*c*) As to these provisos:—

(1) It does not follow that the covenant in the first mortgage is entirely satisfactory to the second Chargee, in which case this proviso may require alteration or deletion. Thus, it will be impracticable for the second Chargee to require that the whole of the insurance shall be with such office or through such insurers as he may direct, if the Company has entered

Power for chargees to insure in case of default.

6. If default shall be made by the Company in effecting or keeping up such insurances as aforesaid or in producing any such receipts on demand or in keeping the said buildings or any part thereof in such state of repair as aforesaid it shall be lawful for but not obligatory upon the Chargees to insure and keep insured the said buildings in such sum as aforesaid in any insurance office or with Lloyd's Underwriters and to repair and keep in repair the same and to enter upon the said land or any part thereof for that purpose and all moneys expended by the Chargees for any such purpose together with interest thereon at the rate of £—— per centum per annum from the time of the same having been expended shall on demand be repaid to the Chargees by the Company and until such repayment shall be a charge upon the said premises in addition to the other moneys hereby secured and interest thereon.

Consolidation provision.

7. Section 93 of the Law of Property Act 1925 shall not apply to this charge.

Exclusion of company's power of granting leases.

8. No power of leasing or accepting surrenders of leases conferred by common law or by any statute shall be exercisable by the Company except with the consent in writing of the Chargees [except as to leases or tenancy agreements of individual flats in the block of flats to be erected on the mortgaged premises for terms of not more than —— at a full rack rent (without taking any premium) but the Company shall not be entitled to exercise this right of granting leases or tenancy agreements after the Chargees' power of sale shall have arisen].

Attornment of tenancy at will.

9. The Company hereby attorns and becomes tenant at will to the Chargees of the said land and premises at a peppercorn rent during such time as any sum or sums shall remain owing on this security but nothing in this clause contained shall prevent the Chargees from at any time entering on and taking possession of the said premises or any part thereof and so determining the tenancy hereby created.

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into a covenant to comply with the first mortgagees' directions as to these matters.

(2) The second proviso may be necessary if the chargees have agreed in the building contract to keep the building insured during the course of its erection, and the building is not complete at the date when this charge is taken.

Provision as to calculating interest where moneys received at short intervals by receiver.

10. In case the Company or Mr. —— shall make default for [one calendar month] in performing any of its or his obligations hereunder the powers conferred on mortgagees by the Law of Property Act 1925 shall be exercisable by the Chargees without notice notwithstanding that none of the events specified in section 102 of the said Act shall have occurred And in case any receiver shall be appointed by the Chargees then notwithstanding that moneys may be received by him at short intervals interest shall be payable on the balance of the sum or sums remaining owing and shall be calculated with [quarterly] rests on [the usual quarter days] And it shall be lawful for the Chargees or their receiver at any time after their statutory power of sale shall be exercisable as aforesaid to expend moneys in repairing altering or making additions to the buildings erected or in course of construction on the land hereby charged and such moneys shall be added to the sum or sums remaining owing and shall stand charged upon the said land and shall bear interest accordingly.

Power for chargees to repair, alter or make additions to buildings.

Provision as to transfer of first charge.

11. That on the payment by the Chargees of the moneys owing on the first charge upon taking a transfer thereof all fines payments in lieu of notice costs and other expenses (including the expenses of any transfer) paid by the Chargees on the occasion of such payment off shall be added to the moneys hereby secured and shall bear interest accordingly and shall be recoverable in like manner and at the like time as the principal moneys payable hereunder.

Recitals in transfers of mortgage to be conclusive.

12. A recital or statement in any transfer of the first charge or of this charge as to the amount payable to the first Chargees or the Chargees (as the case may be) in discharge of the indebtedness of the Company shall be binding and conclusive upon the Company and Mr. ——.

Power for chargees to complete works with variations.

13. Upon the Chargees' power of sale hereunder becoming exercisable the Chargees or any receiver appointed by them may enter upon and take possession of the property hereby charged or any part or parts thereof and of all buildings erections and fixtures whatsoever thereon and (if all or any part of any of the works to be executed under the said building contract shall

then remain unfinished) complete such works but with liberty if they shall think fit to make any modifications or alterations which the Chargees shall consider desirable in the plans elevations or specifications in connection with the said works (subject to any necessary consent of any prior mortgagees) And for the purposes aforesaid the Chargees or any receiver appointed by them may either themselves carry out such works or employ contractors builders workmen and others and may purchase all such materials as they in their absolute discretion deem fit for the purpose of executing the said works or any modifications thereof and all additional expenses incurred by the Chargees or such receiver in the exercise of the foregoing powers shall be added to the moneys hereby secured and bear interest accordingly.

[If land unregistered.]

[14. The Company hereby covenants with the Chargees that during the continuance of this security no person shall be registered under the Land Registration Act 1925 (or any Act amending or re-enacting the same) as proprietor of the premises hereby charged or any part thereof without the consent in writing of the Chargees and that the costs incurred by the Chargees of lodging from time to time a caution against registration of the said premises shall be deemed to be costs properly incurred by them and recoverable and secured by these presents.]

Power of attorney.

15. The Company and Mr. —— irrevocably appoint the Chargees its and his attorneys to do all such acts deeds and things as may be expedient for exercising all or any of the powers exercisable by the Chargees hereunder And no person dealing bona fide with the Chargees shall be concerned or entitled to inquire whether any such powers have arisen but may and shall conclusively assume that any act done by the Chargees hereunder is valid and effective And as between any such person and the Company and Mr. —— any such act shall be valid and effective for all purposes.

Provision as to substitution of another architect in certain events.

16. If at the date when the Chargees' power of sale becomes exercisable hereunder the said works shall not have been fully completed then all certificates already issued by the architect

under the provisions contained in the said building contract shall remain in full force and effect. If thereafter the architect shall make default for fourteen days in issuing any certificate at any stage when a certificate should properly be issued or if the architect shall be removed by Mr. —— or if for any other reason there shall be no architect at any such stage the Chargees may apply to the President for the time being of the Chamber of Commerce to appoint another architect and upon such appointment being made and notice in writing of such appointment being given to Mr. —— at his last known address references in the said building contract to the architect shall be deemed to mean such other architect so appointed as last mentioned and all fees payable to such other architect may be paid by the Chargees and shall be added to the moneys hereby secured and bear interest accordingly.

17. In the construction of this Charge unless the context otherwise requires the expression "the Company" shall mean and include the Company and all persons deriving title under it the expression "Mr. ——" shall mean and include his executors and administrators and the expression "the Chargees" shall mean and include the Chargees and all persons deriving title under them. Definitions.

In witness whereof the Company and the Chargees have caused their respective common seals to be hereunto affixed and Mr. —— has hereunto set his hand and seal the day and year first above written.

The common seal of —— was hereunto affixed in the presence of }

} Directors.

Secretary.

Signed sealed and delivered by the before named —— in the presence of }

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